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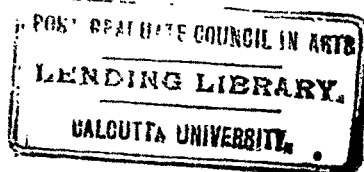
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## THE LACK OF UNIFORMITY IN THE LAW AND PRACTICE OF STATES WITH REGARD TO MERCHANT VESSELS

THERE is at present considerable discussion regarding questions with respect to "the freedom of the seas." These questions, so often vaguely referred to, should presumably be understood to relate to the exercise of belligerent rights on the sea and to embrace such matters as a possible codification of international law touching this subject, proper compliance with rules heretofore generally accepted if not always strictly observed, the desirability of amendments to such rules, and the formulation of principles to meet new problems that have grown out of the recent conflict. In the light of events in connection with the war the present situation with regard to the disposition of such questions through international agreement unhappily appears more difficult than that which confronted the delegates who assembled in conference at London in 1908 on the invitation of the British Government to reach an understanding among the nations represented relative to the rules of international law concerning the laws of naval warfare, and formulated the so-called London Declaration signed February 26, 1909.

On the other hand, when normal commercial relations are restored with the advent of peace, attention will probably be drawn more strongly than heretofore to certain conditions which are obviously detrimental to the promotion of safety of travel at sea and detrimental generally to the harmonious international relations necessary to the development of commerce, such conditions being consequent upon an unfortunate lack of uniformity among states with regard to certain branches of maritime law governing the responsibility of shipowners, laws pertaining to safety of navigation, and laws relating to the general question of jurisdiction over merchant vessels in foreign ports.

It is the purpose of this article briefly to call attention to certain matters touching this subject of the want of harmony in the municipal laws of maritime nations, namely: (1) efforts made in recent years



largely on the initiative of the British Government looking to the remedy of existing difficulties through international agreements; (2) the law and practice of the United States bearing on some phases of the general subject under consideration; and (3) certain important questions lately raised in American and British courts as to jurisdiction over vessels operated under governmental control.

## I

On the invitation of the Government of Belgium an international conference on maritime law was held at Brussels in 1905, for the purpose of promoting uniformity in relation to certain questions of maritime law. Representatives of Belgium, The Kongo, Spain, France, Italy, Japan, Norway, The Netherlands, Roumania, Russia, Sweden, and the United States signed a protocol providing for the submission to their respective governments of *projets* of conventions on collision and salvage respectively. An adjourned meeting of this conference met on October 16 of the same year at Brussels, and the delegates present signed a protocol not materially different from that drafted at the previous meeting. This latter protocol likewise provided for the submission to the governments represented of two drafts of conventions relating to collision and salvage. These proposed conventions had their origin in drafts of conventions approved by the International Maritime Committee at a conference held in Hamburg in 1902. A third session of the conference met at Brussels September 23, 1909. It was attended by delegates from the United States, Germany, Argentine Republic, Austria-Hungary, Belgium, Brazil, Chile, Cuba, Denmark, Spain, France, Great Britain, Greece, Italy, Japan, Mexico, Nicaragua, Norway, Netherlands, Portugal, Roumania, Russia and Sweden. The conference adjourned on October 8 and reconvened September 12, 1910. Two conventions relating to collisions and salvage were approved by the conference and referred to the several governments. The conference also considered drafts of two conventions relating respectively to the limitation of shipowners' liability and maritime liens, but no final action was taken with regard to such proposed conventions. The convention with regard to salvage has been ratified by



the Government of the United States.<sup>1</sup> The convention with regard to collisions has not been ratified by this Government and has not come before the Senate for consideration.

At a conference held at London on the invitation of the Government of Great Britain in 1914 representatives of Germany, Austria-Hungary, Belgium, Denmark, Spain, United States, France, Great Britain, Italy, Norway, Netherlands, Russia and Sweden signed the International Convention on the Safety of Life at Sea. This agreement contains comprehensive provisions relating to precautions against dangers to navigation, the construction of vessels, and appliances for life saving and fire protection. The outbreak of the war rendered nugatory, for the time being at least, the work of this conference.

Ratifications of but few countries, among which the United States is not included, have been deposited with the British Government.

The Senate of the United States, in a Resolution dated December 16, 1914, gave consent to ratification of the convention with a proviso in which it is declared in part that "the United States reserves the right to . . . impose upon all vessels in the waters of the United States such higher standards of safety and such provisions for the health, protection and comfort of passengers, seamen and immigrants as the United States shall exact for vessels of the United States." If other governments should take the view that the so-called reservation contained in the resolution of the Senate is equivalent to an amendment of the treaty, or a reservation of a right of the Government of the United States to disregard the provisions of the treaty at will, it would seem that such nations might object to the acceptance of such a ratification. And this Government would appear to be in a position to deposit its ratification only if it may properly be considered that the reservation made by the Senate in connection with its consent to the ratification of the convention is in effect a surplusage which does not affect the treaty directly and at most only violates the treaty in spirit,

<sup>1</sup> International Convention for the Unification of Certain Rules of Law with Respect to Assistance and Salvage at Sea, ratification of which was deposited with the Belgian Government January 25, 1913. See Act to carry this treaty into effect (37 Stat. L. 242).

or if the convention should be sent back to the Senate and an unconditional consent should be given by that body to ratification of the convention.

In the interest of safety of life at sea the several signatory powers prescribed in the treaty, through their plenipotentiaries in conference, certain standards with respect to the equipment and operation of vessels. The Government of the United States having agreed to these standards, it seems odd for this Government to make a declaration to the effect that it will adhere to them but that it reserves the right to change them and to impose on all vessels in its waters, foreign as well as American vessels, such higher standards of safety as it may deem appropriate.

However, it can perhaps be plausibly argued that, whatever action might be taken in the future in accordance with the possible purposes indicated in the Senate's reservation with respect to the Convention for the Safety of Life at Sea, such action would not necessarily be violative of the treaty, though it might be objectionable to foreign nations whose vessels it would affect.

A fair construction of the treaty seems to be that it imposes upon each of the contracting nations obligations to exact of its own vessels the requirements of the convention with respect to their equipment and operation, but not obligations to see to it that these requirements are met by the vessels of other contracting nations.

It would, therefore, seem that, although foreign nations might question the right of this Government to substitute in its judgment standards as to the equipment of American vessels in place of those specified by the treaty, if it should impose on its own vessels not only the standards required by the treaty but also certain higher standards, other nations would not be in a position to complain of a violation of the treaty on the part of this Government.

Should this Government attempt to impose on vessels of other nations standards other than those prescribed by the treaty, such action would doubtless be regarded by those nations as objectionable, but a complaint of treaty violation could probably be met with the reply that the only obligations which the treaty imposes on this Government are those requiring it to see to it that its vessels are operated

and equipped in accordance with the rules prescribed by the treaty, and that if this Government sees fit to prescribe certain rules for vessels of other countries, its action in such a matter is one with which the treaty is not concerned, so long as the regulations imposed on the foreign vessels are not such as to require these vessels to disregard the standards prescribed by the convention.

Unfortunately it seems possible that the work of the conference which framed this convention may become a nullity in consequence of the intervention of the war. But it may be that an understanding can be reached to prevent such a result.

## II

It appears that the Government of Great Britain had under consideration shortly prior to the outbreak of the war the question of the advisability of endeavoring to effect an arrangement with other nations with regard to the question of jurisdiction over merchant vessels in foreign ports. Possibly this interesting subject may be taken up when the condition of international affairs will permit such action.

The Supreme Court of the United States and the lower federal courts have in numerous cases set forth the rules defining the law and practice of the United States relative to the exercise of criminal and civil jurisdiction by this government over foreign merchant vessels and persons on board of them in territorial waters of this country, and over American vessels and persons thereon in foreign waters. Reference to a few cases will serve to call attention to the general principles enunciated.

With regard to the exercise of jurisdiction in criminal matters by the courts of this country over foreign ships in American waters and over persons on board such vessels, the leading case may doubtless be considered to be that known as *Wildenhus's Case*,<sup>2</sup> in which the Supreme Court of the United States sustained the jurisdiction of the courts of New Jersey where the crime of felonious homicide had been committed by a Belgian subject on the person of another Belgian subject on board of a Belgian vessel lying in the port of Jersey City,

<sup>2</sup> 120 U. S. 1.

New Jersey. In the following excerpt from the opinion of the court delivered by Mr. Chief Justice Waite are enunciated the rules underlying the assumption or non-assumption of jurisdiction by the local courts:

It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purpose of trade, it subjects itself to the laws of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief Justice Marshall in *The Exchange*, 7 Cranch, 116, 144, "it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such . . . merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country." *United States v. Dickelman*, 92 U. S. 520; 1 Phillimore's Int. Law, 3d ed. 483, Sec. 351; Twiss' Law of Nations in Time of Peace, 229, Sec. 159; Creasy's Int. Law, 167, Sec. 176; Halleck's Int. Law, 1st ed. 171. And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. *Regina v. Cunningham*, Bell C. C. 72; S. C., 8 Cox C. C. 104; *Regina v. Anderson*, 11 Cox C. C. 198, 204; S. C., L. R. 1 C. C. 161, 165; *Regina v. Heyn*, 13 Cox C. C. 403, 486, 525; S. C., 2 Ex. Div. 63, 161, 213. As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled.

From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged, as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority.

The rules with regard to the exercise of civil jurisdiction in cases involving the rights of foreign vessels or persons connected with such vessels have frequently been announced by the courts in a variety of cases.

In *ex parte Newman*<sup>3</sup> a case in which foreign seamen had libeled a foreign vessel for wages, the Supreme Court of the United States said that admiralty courts will not take jurisdiction in such a case, except where it is manifestly necessary to do so to prevent failure of justice; that the better opinion is that independent of treaty stipulations there is no constitutional or legal impediment to the exercise of jurisdiction in such a case, but that the courts will not do so as a general rule without the consent of the representative of the country to which the vessel belongs, where it is practicable that the representative should be consulted.

In the case of the *Carolina*,<sup>4</sup> a British vessel, in which an action was brought by a foreign seaman in the United States Court for the District of Louisiana to recover damages for assault and battery alleged to have been committed on the high seas, the court said:

It is undoubtedly true, as a general proposition, that an action for a personal tort follows the person, and may be brought in any foreign court. It is also true that the courts of a nation are established and maintained for the convenience of its own citizens or subjects, and if foreigners are permitted to become actors therein it is because of what is termed comity between nations. American Law Review, vol. 7, p. 417, and Daniel Webster's Works (Everett's Edition), vol. 6, pp. 117, 118. The only ground upon which a foreigner could urge a claim to become a libellant in our courts would be that it was by comity due his government that its subjects should be thus heard, and, so far as this claim could be considered as a right, it could be insisted on only by that government, and, except in cases of inhumanity or gross injustice, would disappear whenever the claimant's government took a position against it.

The court stated that the exercise of jurisdiction in this case was discretionary, and that the courts of Great Britain afforded adequate redress to the libellant. The court therefore declined to take jurisdiction.

In *Patterson v. Barke Eudora*,<sup>5</sup> the Supreme Court of the United

<sup>3</sup> 14 Wall. 152.

<sup>4</sup> 14 Fed. Rep. 424.

<sup>5</sup> 190 U. S. 169.

States held that a British vessel and its master were within the provisions of the Act of December 31, 1898, prohibiting the payment to seamen of advanced wages. The Court, after referring to previous decisions in relation to the question of jurisdiction over foreign vessels, said:

The implied consent of this government to leave jurisdiction over the internal affairs of foreign merchant vessels in our harbors to the nations to which those vessels belong may be withdrawn. Indeed, the implied consent to permit them to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn it may be extended upon such terms and conditions as the government sees fit to impose. And this legislation, as plainly as words can make it, imposes these conditions upon the shipment of sailors in our harbors, and declares that they are applicable to foreign as well as to domestic vessels.

The general principles laid down in the cases to which attention has been called are concisely summarized with citations in the following extract from the opinion of the court in the case of *Ester*,<sup>6</sup> in which suit was brought against a Swedish steamship by a seaman to recover unpaid wages and damages for personal injury:

(1) The merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit, so long as they remain. *United States v. Diekelman*, 92 U. S. 520, 23 L. Ed. 742; *Wildenhus' Case*, 120 U. S. 11, 7 Sup. Ct. 385, 30 L. Ed. 565.

(2) In the absence of treaty stipulations, the courts of admiralty have civil jurisdiction in all matters appertaining to the foreign ship while in port, and also in certain cases when the court has the vessel in its territorial jurisdiction, although the cause of action arose on the high seas, *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; *Wildenhus' Case*, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. Ed. 565.

(3) The exercise of this civil jurisdiction, where those who are concerned are all citizens of the same foreign state and the cause of action occurred on or with regard to the ship, is not imperative, but discretionary, and the courts from motives of convenience or international comity will not take jurisdiction without the assent of the consul of the country to which the ship belongs, where the controversy involves matters arising beyond the territorial jurisdiction of this country, or relates to differences between the master and the crew, or

<sup>6</sup> 190 Fed. Rep. 218.

the crew and the shipowners. In such cases on such general principles of comity, the admiralty courts of this country will not interfere between the parties, unless there is special reason for doing so, and will require the foreign consul to be notified, and although not absolutely bound by, will always pay respect to, his wishes as to taking jurisdiction. *Ex parte Newman*, 14 Wall. 152, 20 L. Ed. 877; *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; *Patterson v. Eudora*, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002.

(4) Where, however, special circumstances exist, such as where the voyage is ended, or the seamen have been dismissed or treated with great cruelty, the courts, in the absence of treaty stipulations, will entertain jurisdiction. *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152.

(5) Where treaty stipulations exist, however, with regard to the right of the consul of a foreign country to adjudge controversies arising between the master and the crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations are the law of the land, and must be fairly and faithfully observed. *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; *Widenhus' Case*, 120 U. S. 17, 7 Sup. Ct. 385, 30 L. Ed. 565.

(6) Congress has power by legislation to regulate matters affecting foreign seamen and foreign vessels and foreigners generally when within the ports of this country by making their entrance subject to such conditions as Congress may seek to impose or withdrawing its consent to permit them to enter wholly, if it see fit. *Patterson v. Eudora*, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002.

With reference to the question of the jurisdiction over American merchant vessels in foreign territorial waters, it may be said that the Government of the United States in the past has asserted in behalf of its vessels the rights which, as indicated by the judicial decisions just mentioned, are accorded to foreign vessels in waters of the United States. This Government, while conceding on the one hand that when one of its vessels visits the port of another country for the purposes of trade it is amenable to the jurisdiction of that country and is subject to the laws which govern the port it visits so long as it remains, unless it is otherwise provided by treaty, has on the other hand, on a number of occasions, made clear its view that by comity matters of discipline and all things done on board which affect only the vessel or those belonging to her and do not involve the peace or dignity of the country or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which

the vessel belongs, as the laws of that nation or the interests of its commerce may require.<sup>7</sup>

Private vessels belonging to this country are deemed parts of its territory. They are accordingly regarded as subject to the jurisdiction of this country, on the high seas, and in foreign ports, even though they admittedly are also temporarily subject generally to the laws of such ports.

In *United States v. Rodgers*,<sup>8</sup> a case in which the Supreme Court sustained the jurisdiction of courts of the United States to try a person for an assault committed on a vessel belonging to a citizen of the United States while such vessel was in the Detroit River and within the limits of the Dominion of Canada, Mr. Justice Field, who delivered the opinion of the court, said:

It is true, . . . that, as a general principle, the criminal laws of a nation do not operate beyond its territorial limits, and that to give any government, or its judicial tribunals, the right to punish any act or transaction as a crime, it must have occurred within those limits. We accept this doctrine as a general rule, but there are exceptions to it as fully recognized as the doctrine itself. One of those exceptions is that offences committed upon vessels belonging to citizens of the United States, within their admiralty jurisdiction, (that is, within navigable waters,) though out of the territorial limits of the United States, may be judicially considered when the vessel and parties are brought within their territorial jurisdiction. As we have before stated, a vessel is deemed part of the territory of the country to which she belongs.

On March 4, 1915, the President approved an Act of Congress usually referred to as the "Seamen's Act."<sup>9</sup> The general purposes of this law evidently were the improvement of the condition of seamen and the promotion of safety of life at sea.

Whatever may be the merits of this act it can undoubtedly be said to have aroused a good deal of criticism in foreign countries. The questions that have arisen in connection with its enforcement with regard to foreign vessels, to which it is applicable the same as to American vessels, may be said to fall into two classes, namely: (1) those

<sup>7</sup> See Moore, Digest, II, pp. 272-362.

<sup>8</sup> 150 U. S. 249.

<sup>9</sup> 38 Stat. L. 1164.



involving treaty rights affected by certain provisions of the act, and (2) those which, while not involving legal rights, relate to international comity and established customs of nations.

Provisions of the first-mentioned class are found in Sections 4 and 16 of the Act. Section 4, which provided among other things for the enforcement of certain specified rights of foreign seamen respecting their wages, and further provided that the courts of the United States should be open to such seamen for its enforcement, was inconsistent with treaty stipulations withdrawing from the jurisdiction of local authorities wages disputes between masters and members of the crews of merchant vessels. Section 16 directed the President to give notice within ninety days of the passage of the act to foreign governments of the termination of treaty stipulations providing for the arrest and imprisonment of deserting seamen from vessels of the United States abroad or from foreign vessels in American ports. Stipulations in a score of treaties were affected by the law.<sup>10</sup>

The act was framed so that at the end of a certain period the stipulations inconsistent therewith could no longer be enforced in this country and should of course not be invoked by American Consular Officers abroad. And since practically all of these agreements did not contain provisions for partial abrogation a somewhat difficult task in adjusting conflicts between the law and the treaty provisions in question confronted the executive department of the Government except in two instances in which the treaties contained no provisions other than those affected by the law.

Statutory provisions of the second class just mentioned are found

<sup>10</sup> Austria-Hungary, May 8, 1848, Art. IV, and July 11, 1870, Arts. XI and XII; Belgium, March 9, 1880, Arts. XI and XII; Bolivia, May 13, 1858, Art. XXXIV; China, June 15, 1858, Art. XVIII; Colombia, December 12, 1846, Art. XXXIII, and May 4, 1850, Art. III; Denmark, July 11, 1861, Arts. I and II; Great Britain, June 3, 1892; France, June 24, 1822, Art. VI, and February 23, 1853, Arts. VIII and IX; Greece, November 19, 1902, Arts. XII and XIII; Italy, May 8, 1878, Art. XIII, and February 24, 1881; Independent State of the Kongo, January 25, 1891, Art. V; Netherlands, January 19, 1839, Art. III, and May 23, 1878, Art. XII; Norway, July 4, 1827, Arts. XIII and XIV; Roumania, June 17, 1881, Arts. XI and XII; Spain, July 3, 1902, Arts. XXIII and XXIV; Sweden, June 1, 1910, Arts. XI and XII, and July 4, 1827, Arts. XIII and XIV; and Tonga, October 2, 1886, Art. X.

in Sections 4, 11, 13 and 14 of the act. Section 4 provides that seamen shall be entitled to receive on demand from the master of the vessel one-half of the wages which they have earned at every port where the vessel shall load or deliver cargo. Section 11 makes unlawful the payment of advance wages of seamen. Section 13 provides that no vessel (with certain exceptions) shall be permitted to depart from a port of the United States unless it has on board a crew not less than 75 per centum of which in each department are able to understand any order given by the officers of the vessels, nor unless a certain percentage of the crew "are of a rating not less than able seamen." Section 14 of the law contains provisions relating to "life saving appliances, their equipment and the maintaining of the same."

Briefly summarized, the important international aspects of the Act of March 4, 1915, which have been pointed out, grow out of provisions thereof that affect treaty arrangements of long standing, that apparently in a measure set aside the general rule of comity under which American courts have refused to take jurisdiction in certain controversies between masters and seamen, and that run counter to laws and customs of other countries and have the effect of nullifying contracts made outside of the jurisdiction of the United States, and of compelling foreign nations to conform to the ideas of this country in matters relating to the equipment of vessels and the treatment and qualifications of seamen, some phases of which are dealt with by the London Convention for the Safety of Life at Sea.

### III

Some interesting questions have been raised in the courts of this country and in British courts during the war with regard to jurisdiction over vessels which have been diverted from their customary employment because of conditions brought about by the war, namely, vessels requisitioned by the governments to which they belonged and government owned vessels employed in commerce.<sup>11</sup>

<sup>11</sup> See *The Luigi*, 230 Fed. Rep. 495; *The Attualita*, 238 Fed. Rep. 909; *The Pampa*, 245 Fed. Rep. 137; *The Florence H.*, 248 Fed. Rep. 1014; *The Roserio* (D. C. N. J.) decided in November, 1918; *The Broadmayne* (1916), L. T. Rep. 891; *The Messicano*, 32 L. T. Rep. 519.

In the case of *The Attualita*,<sup>12</sup> an Italian merchant vessel requisitioned by the Italian Government, the Circuit Court of Appeals for the Fourth Circuit held that the vessel was not exempt from suit in a court of this country. This ship, which it appears was employed in the Italian Government service at a fixed rate and remained under the control and management of the owner who paid the officers and crew, had been libeled by a Greek steamer to recover damages for loss resulting from a collision between the two vessels which occurred in the Mediterranean Sea. The contention was pressed in this case that *The Attualita* being under requisition of the Italian Government was immune from the jurisdiction of the courts of this country under principles of international law.

The decision of the court appears clearly to be grounded on sound principles.

It is of course well settled that aliens have free access to the courts of this country to maintain and defend their rights in cases of this character.<sup>13</sup>

In the opinion of the court reference was made to the well known case of *The Exchange*,<sup>14</sup> in which the Supreme Court of the United States held that the public armed vessels of a foreign nation may, upon principles of comity, enter the harbors of this country with the presumed license of the government, and while there are exempt from the jurisdiction of local courts.

Chief Justice Marshall in rendering the opinion of the court said that the "perfect equality and absolute independence of sovereigns, and common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation." It appears that he divided these cases into the following classes: (1) the immunities accorded the person of the sovereign in a foreign country; (2)

<sup>12</sup> 238 Fed. Rep. 909.

<sup>13</sup> *The Maggie Hammond*, 9 Wall. 435; *The Belgenland*, 114 U. S. 368; *The Kaiser Wilhelm der Grosse*, 175 Fed. Rep. 215.

<sup>14</sup> 7 Cranch, 116.

the immunities granted by civilized nations to foreign diplomatic representatives; (3) the immunities allowed the troops of a foreign prince which are permitted to pass through his dominions; and (4) the immunities granted to public armed vessels.

In the light of this often quoted rule there appears to be no violation of international law or comity in the action of an admiralty court in taking jurisdiction in proceedings *in rem* or *in personam* instituted with a view to recovering indemnity for loss resulting from the alleged improper navigation of a merchant vessel the services of which the owner thereof has been temporarily required by his government to place at its disposal in consideration of a stipulated compensation for such services.

Any contention that a court in the United States should not adjudicate a controversy of this kind because a sovereign should not be impleaded as a private litigant to defend his rights before judicial tribunals of a foreign government, appears clearly not to be well grounded. The action of a court in taking jurisdiction in the case must not necessarily result in impleading the government to which the vessel belongs, since the courts are open to the owner of the vessel to defend his rights in proceedings instituted against it.

The following excerpt from the opinion of the court in *Workman v. The Mayor*,<sup>15</sup> in which Mr. Justice White discussed at some length the question of the right to recover for maritime torts committed by government owned vessels, seems pertinent to this point:

We, of course, conceive that where maritime torts have been committed by the vessels of a sovereign, and complaint has been made in a court of admiralty, that court has declined to exercise jurisdiction, but this was solely the cause of the immunity of sovereignty from suit in its own courts. So, also, where, in a court of admiralty of one sovereign, redress is sought for a tort committed by a vessel of war of another nation, it has been held that as by the rule of international comity the sovereign of another country was not subject to be impleaded, no redress could be given. Both of these rules, however, proceed upon the hypothesis of the want of a person or property before the court over whom jurisdiction can be exerted. As a consequence, the doctrine above stated rests not upon the supposed want of power in courts of admiralty to redress a wrong committed by one

<sup>15</sup> 179 U. S. 552.

over whom such courts have adequate jurisdiction, but alone on their inability to give redress in a case where jurisdiction over the person or property cannot be exerted. In other words, the distinction between the two classes of cases is that which exists between the refusal of a court to grant relief because it has no jurisdiction to do so, and the failure of a court to afford redress in a case where the wrong is admitted and jurisdictional authority over the wrongdoer is undoubted.

The principle enunciated by Mr. Justice White apparently underlies the decision of the court in the case of *Johnson Lighterage Co. No. 24*,<sup>16</sup> in which it was held that a suit *in rem* could be maintained against the property of a foreign government to recover for salvage services rendered in saving the property while in the possession of a Lighterage Company which had contracted to transport it from a railroad terminal to a vessel. Judge Haight, in the opinion rendered by him in this case, said:

It is undoubtedly the general rule that the courts of this country are without jurisdiction to entertain, except by consent, either an action in personam against our own government or that of a friendly foreign nation or sovereign, or an action against its property in its possession and devoted or destined to be devoted to the public use. *The Siren*, 7 Wall. 152, 154, 19 L. Ed. 189; *Stanley v. Schwalby*, 147 U. S. 508, 512, 13 Sup. Ct. 418, 37 L. Ed. 258; *The Exchange*, 7 Cranch, 116, 3 L. Ed. 287; *Tucker v. Alexandroff*, 183 U. S. 424, 440, 463, 22 Sup. Ct. 195, 46 L. Ed. 264; *Hassard v. United States of Mexico*, 46 App. Div. 623, 61 N. Y. Supp. 939; *Briggs v. Light Boats*, 11 Allen (Mass.) 157. But there is what may be termed an exception to this rule, although it is probably not strictly such, which was enunciated and applied by the Supreme Court, so far as our own government is concerned, in *The Davis*, 10 Wall. 15, 19 L. Ed. 875, and followed and applied as to a foreign government by Judge Brown, in the Southern District of New York, in *Long v. The Tampico* (D.C.) 16 Fed. 491. This so-called exception, I think, must control the questions to be decided in the case at bar. In the former of these cases it was held that personal property of the United States on board a private vessel for transportation from one point to another was liable to a lien for services rendered in saving it, and although such lien could not be enforced by a suit against the United States, or by a proceeding *in rem*, when the possession of the property could only be had by taking it out of the actual possession of an officer of the government, yet it could be enforced by a proceeding *in rem* where the process

<sup>16</sup> (1916) 231 Fed. Rep. 365.

of the court could be enforced without disturbing the possession of the government.

In *The Attualita* case the court very pertinently commented as follows on the serious consequence of a decision which would grant to a privately owned merchant vessel in the service of the government whose flag it flies the immunities accorded to foreign war vessels:

There are many reasons which suggest the inexpediency and the impolicy of creating a class of vessels for which no one is responsible in any way. For actions of the public armed ships of a sovereign, and for those whether armed or not, which are in the actual possession, custody and control of the nation itself, and are operated by it, the nation would be morally responsible although without her consent not answerable legally in her own or other courts. For the torts and contracts of an ordinary vessel it and its owners are liable. But the ship in this case, and there are now apparently thousands like it, is operated by its owners, and for its action no government is responsible at law or in morals.

The persons in charge of the navigation of the ship remain the servants of the owners and are paid by the owners. The immunity granted to diplomatic representatives of a sovereignty, to its vessels of war, and under some circumstances to its other property in its possession and control, can be safely afforded because the limited numbers and the ordinarily responsible character of the diplomats or agents in charge of the property in question and the dignity and honor of the sovereignty in whose services they are, make abuse of such immunity rare. There will be no such guaranty for the conduct of the thousands of persons privately employed upon ships which at the time happen by contract or requisition to be under charter to sovereign governments.

In line with the thought expressed in the above quoted excerpt it may be observed that, if merchant vessels under requisition of the government of the country to which they belong should be regarded as entitled in the ports of another country to the immunities accorded to public armed vessels the local tribunals of such other country would seemingly be impotent to determine even the rights of its own nationals in cases involving torts, salvage and contracts of various kinds, and controversies between seamen and masters of vessels. And the local courts might be precluded from the administration of criminal jurisprudence in cases wherein the arrest of any persons con-

nected with the vessel for an offense committed within the territorial jurisdiction of the country wherein the courts are located might occasion delay in the departure of the vessel from the port.

With regard to the question of the lack of remedies open to persons who may be precluded from asserting rights against a vessel under requisition in the courts, it seems clear that it is not a sufficient answer that redress may be sought directly from the government to which the vessel belongs. If, as seems possible might be the case, no such redress is available—and at best it would be inconvenient and uncertain—such persons evidently have no remedy except by application to their government for assistance through diplomatic channels, a remedy likewise uncertain as well as long drawn out.

There are other serious questions pertinent to be considered in relation to the status of requisitioned vessels. If the view should be taken that such vessels should be given a treatment assimilated to that accorded to vessels of war and should not be subjected to laws and regulations governing merchant vessels in foreign ports, a grave question might be raised as to the propriety of neutral governments permitting such vessels freely to enter and leave their ports and to transport therefrom merchandise of all kinds, including articles of contraband in times of war.

In the case of *The Belgenland*,<sup>17</sup> the Supreme Court of the United States pointed out that there are certain circumstances in which courts in this country will exercise their discretion to take or to refuse jurisdiction over foreign vessels, their officers, and crews in ports of the United States.

In the case of *The Attualita* it was argued that in the exercise of a sound discretion jurisdiction should be declined. Such a contention, the court held, was foreclosed by what the court said in the case of *The Belgenland*. It may be observed with regard to this point that, apart from what the court said in this last mentioned case, the grounds upon which it appears proper to sustain the jurisdiction of courts in cases involving requisitioned vessels seem pertinent to the question as to whether the courts should in the exercise of their discretion decline to take jurisdiction.

<sup>17</sup> 114 U. S. 365.

The reasons why courts should not decline to take jurisdiction in the case of vessels of the character in question could seemingly be advanced at least to some degree against the action which it appears was taken by Judge Chatfield of the District Court of the Eastern District of New York, in deciding that, without prejudice to the court's jurisdiction, the steamship *Glenedin*, a private merchant vessel, under requisition to the British Government, might be released to that Government for the purpose of being used as a public vessel on the giving of a bond to secure the claim or to return the vessel except as the needs of the British Government might keep it elsewhere while under requisition or charter by the British admiralty.<sup>18</sup>

In the case of the *Maipo*,<sup>19</sup> the District Court for the Southern District of New York held that a naval transport owned by a foreign government and in its possession through a naval captain and crew, although chartered to a private individual to carry a commercial cargo, was not subject to seizure under process of an admiralty court of the United States in a suit by shipper for damage to the cargo. The contention appears to have been raised by the libellant in this case that the ship was subject to process because of its use for commercial purposes. A case of this character appears to raise a question of jurisdiction somewhat more vexatious than that involved in the case of a requisitioned vessel engaged in trade.

In the case of *The Charkieh*,<sup>20</sup> Sir Robert Phillimore held that a vessel owned by the Khedive of Egypt, though flying the flag of the Turkish Navy, was not free from process *in rem*, when she had come with a cargo to England and had been entered at the customs like an ordinary merchant vessel. While the case apparently was decided on the ground that the Khedive was not an independent sovereign, the court said:

I must say that if ever there was a case in which the alleged sovereign (to use the language of Bynkershoek) was "strenue mercatorem agens," or in which, as Lord Stowell says, he ought to "traffick on the common principles that other traders traffick" it is the present

<sup>18</sup> Decided November 27, 1918.

<sup>19</sup> (July 8, 1918) 252 Fed. Rep. 627.

<sup>20</sup> Law Rep. 4 A. & E. 59.



case; and, if ever a privileged person can waive his privilege by his conduct, the privilege has been waived in this case.

It was not denied, and could not be denied, after the evidence that the vessel was employed for the ordinary purposes of trading. She belongs to what may be called a commercial fleet. I do not stop to consider the point of her carrying the mails, for that was practically abandoned by counsel. She enters an English port and is treated in every material respect by the authorities as an ordinary merchantman, with the full consent of her master; and at the time of the collision she is chartered to a British subject, and advertised as an ordinary commercial vessel. No principle of international law, and no decided case, and no dictum of jurists of which I am aware has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character; while it would be easy to accumulate authorities for the contrary position. (See, especially, Klüber Europe. Volkerrecht, Sec. 210, and authorities cited in note.)

Judge Mayer in his decision in the case of *The Maipo* referred to the case of *The Charkieh* as the "sole authority for the libellant's view" of the status of *The Maipo* and said that the former had been overruled by *The Parlement Belge*.<sup>21</sup> In that case the court held that an unarmed packet belonging to the King of Belgium and in the hands of officers commissioned by him and employed in carrying mails was not liable to be seized in a suit *in rem* to recover redress for a collision, and that the fact that the vessel had been engaged in trade did not take away the immunity attaching to it as a public vessel, the property of an independent sovereign.

Judge Mayer's opinion in the case of *The Maipo* is evidently in harmony with the decision in the *Parlement Belge*, and with the general trend of American and British cases involving questions with regard to the immunity of government owned property.<sup>22</sup> However, it is submitted that there is a sound doctrine in the observations made by Sir Robert Phillimore in the case of *The Charkieh* with regard to

<sup>21</sup> (1878) L. R. 5 P. D. 197.

<sup>22</sup> *The Siren*, 7 Wall. 152; *The Davis*, 10 Wall. 15; *Stanley v. Schwalby*, 147 U. S. 508; *Hassard v. Mexico*, 61 N. Y. Supp. 939; *The Athol*, 1 Wm. Rob. 374.

the forfeiture of immunity by a government owned vessel employed for commercial purposes.

The experience of judicial and administrative authorities in the United States during the last few years, when navigators of requisitioned vessels and government owned vessels have frequently been involved in litigation in courts in this country, and when large quantities of various kinds of property have been purchased here in behalf of foreign governments, suggests the unfortunate consequences of a general rule that courts of the United States are without jurisdiction to entertain a suit against the property of a foreign government within the jurisdiction of this country. If the theory of such an immunity is carried to its logical conclusion, it would seem to follow that not only may persons be deprived of the right to institute proceedings involving government owned property in tort and in contract but governmental authorities may be debarred from imposing equitable taxation on such property and from subjecting it to laws generally applicable to similar privately owned property. To the objection that the taking of jurisdiction by the courts in cases of this character is derogatory to the sovereignty of the government to which the property belongs, it seems a sufficient answer that it is equally and indeed considerably more derogatory to the sovereignty of the country in which the property is found to be shorn of vital attributes of sovereignty, exercised through administrative and judicial authorities, in order that such immunity may be granted.

It is interesting to observe in connection with this question of immunity of government owned vessels that the Act of Congress of September 7, 1916,<sup>23</sup> contains the following provision with regard to the operation of vessels purchased, chartered or leased from the United States Shipping Board:

Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole, or in part, or hold any mortgage, lien or other interest therein.

The importance of harmonious practice among nations with re-

<sup>23</sup> 39 Stat. L. 728.

gard to questions such as those roughly sketched in this article is obvious. Considering the difficulties in the way of progress in attaining this object, it is unfortunately true that much time and effort will be required in making any appreciable headway in dealing with the numerous and various problems requiring solution.

FRED K. NIELSEN.

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## TREATMENT OF ENEMY ALIENS

(Being Part XVI of Some Questions of International Law in the European War. Continued from previous numbers of the JOURNAL.)

### RIGHT OF ACCESS TO THE COURTS

*English and American Doctrine and Practice.* The question of the right of enemy subjects to sue in the courts of an adversary can hardly be said to be regulated by international law, unless the much-controverted Article 23(h) of the Hague Convention of 1907 respecting the laws and customs of war on land, is interpreted to apply to the actions of the judicial authorities. Certainly it is not true, as is sometimes asserted, that it is a principle of international law that they have no right of access to the courts of the adverse power. Like the practice in respect to trading with the enemy the matter is determined by the municipal law of each belligerent and is based upon considerations of public policy.<sup>1</sup> The early English common law rule was that an action could not be brought in an English court by or on behalf of an enemy alien except by virtue of a statute, order in council, proclamation or license from the Crown, or unless he came into the country under a flag of truce, or cartel, or in pursuance of some other act of public authority which put him in the King's peace *pro hac vice*. As long ago as 1454 Mr. Justice Ashton said that "an alien enemy who came here under the King's license or a safe conduct could maintain an action for trespass."<sup>2</sup> In the leading early case on the subject, *Wells v. Williams*, decided in 1698, and many times cited by the English courts during the recent war, it was held that, although an enemy alien was in England without a safe conduct, yet if he continued to reside there by the King's leave and protection and without molesting the government and without being molested by

<sup>1</sup> Compare Huberich, *Trading with the Enemy*, p. 191; also the recent Canadian case of *Korzwinski v. Harris Construction Co.* (1916), 18 Que. P. R. 97.

<sup>2</sup> 1 Salk. 45, quoted by the Court of Appeal in *Porter v. Freudenberg* (1915), 112 L. T. R. 313.

it, he could sue in the King's courts, for the exercise of such a right was a consequence of the protection offered him.<sup>3</sup> This rule was followed by Sir William Scott a hundred years later in the case of the *Hoop*<sup>4</sup> where he said:

In the law of almost every country the character of alien enemy carries with it a disability to sue or sustain, in the language of the civilians, a *persona standi iudicio*. The peculiar law of our own country applies this principle with great rigor. The same principle is received in our courts of the law of nations. They are so far British courts that no man can sue who is an enemy, unless under the particular circumstances that *pro hac vice* discharge him from the character of an enemy, such as the circumstances mentioned above.<sup>5</sup>

The rigor of this ancient rule which virtually treated enemy aliens as *ex lege* and without the right of access to the courts has recently been criticized as "a relic of barbarous days when the lives and property of all enemies were forfeit to the victor;"<sup>6</sup> nevertheless it left open a loophole by which the English courts have in fact been able to open their doors to enemy aliens while at the same time respecting the general principle of the old doctrine. In practice, whenever an enemy subject resident in England has been able to show that he was there with an express or implied license of the King he has been allowed to appear in the courts either as a plaintiff or a defendant. The onus

<sup>3</sup> 1 Ld. Raym. 282. Some question was raised by Mr. Justice Younger, in the case of *Schaffenius v. Goldberg* (1915) as to the authenticity of the phrase quoted above "without being molested by the government," which does not appear in several reports of the case. The matter was discussed at some length by counsel.

<sup>4</sup> 1 C. Rob. 196, 201 (1799). The case law of England and the United States is reviewed by Huberich in his work on *Trading with the Enemy*, pp. 191 ff.

<sup>5</sup> Mr. Justice Story, in his *Notes on the Principles and Procedure of Prize Courts* (p. 21), adopted the same principle.

<sup>6</sup> Such is the opinion expressed by the London *Solicitor's Journal and Weekly Reporter* of January 23, 1915. See also the criticism by Dr. Sieveking, *International Law Association Reports*, 1913, p. 169, who remarks that "there is no earthly reason why a subject of one of the belligerent powers should not be allowed to appear in the courts of the other nation and obtain a judgment, provided execution, unless out of funds in the enemy's country, be stayed until the termination of the war. The idea of his being an alien enemy and therefore having no *persona standi iudicio* is too old to be seriously considered."

of showing this has not been difficult, for enemy aliens who are allowed to remain in the country after the outbreak of the war have generally been assumed to be there by an implied license under the protection of the Crown. This follows as a logical consequence of registration, internment and other similar measures. It amounts to this, therefore, that under this rule practically the only enemy persons to whom the courts were closed during the late war were those resident in the enemy country or who, though resident in England, were not regarded as being under the protection of the Crown.<sup>7</sup>

*Article 23(h) of the Hague Convention No. IV, of 1907.*—Until 1907 there was no doubt that belligerents were free to close their courts to enemy subjects at will, that is to say, the question was one solely of municipal law; but it is not quite clear whether that liberty of action was not surrendered by the adoption of Article 23(h) of the Hague Convention of 1907 respecting the laws and customs of war on land. This provision declares that it is especially forbidden “*de déclarer éteints, suspendus ou non-recevables en justice, les droits et actions des nationaux de la partie adverse.*” The prohibition which it establishes was added at the suggestion of two German delegates, Herr Göppert and General von Gründell, the latter of whom in explaining its purpose in the committee said its object was not limited to protecting corporeal property from confiscation but that it had in view “the whole domain of obligations, by prohibiting all legislative measures which, in time of war, would place the subject of an enemy state in a position of being unable to enforce the execution of a contract by resort to the courts of the adverse party.”<sup>8</sup> In other words, its object was to prohibit belligerents from depriving enemy subjects by legislation or otherwise of the means of enforcing their legal rights

<sup>7</sup> Compare Picciotto, “Alien Enemy Persons, Firms and Corporations in English Law,” *Yale Law Journal*, 27:172 (1917). A classification of the holdings of the English courts in respect to the right of enemy aliens to sue may be found in the brief of the Attorney General in the case of *Re Merten's Patents* (1915), 112 L. T. R. 315. The decisions are grouped under three heads: (1) those upholding the right to sue; (2) those denying the right; and (3) those which deny the right to sue as plaintiffs but uphold the right to sue as defendants.

<sup>8</sup> *Deuxième Conférence Internationale de la Paix, Actes et Documents*, Tome III, p. 103.

through resort to the courts. It therefore overruled the doctrine of the English and American courts that contracts with alien enemies are generally suspended or terminated by the outbreak of war and that enemy subjects have no rights of action in the courts except under the peculiar circumstances mentioned by Sir William Scott and Judge Story referred to above.<sup>9</sup>

*English and American Interpretation of Article 23(h).*—English and American authorities have, however, placed a different interpretation on the meaning of Article 23(h) and the matter has been the subject of much controversy. According to their view the purpose of the article in question was merely to prohibit commanding generals and their subordinates in the field from suspending or extinguishing the legal rights of the inhabitants and did not contemplate a restriction on the right of the state through its legislative, executive, or judicial organs to exclude generally enemy subjects from bringing actions in its courts.<sup>10</sup> In favor of this view it is argued that the position of Article 23(h) clearly shows that it was intended merely as a limitation on the powers of military commanders in the actual theater of hostilities. It is a part of a chapter entitled "Means of injuring the enemy; sieges and bombardments," which is in turn a subdivision of a general heading entitled "hostilities," all the provisions of which relate to the conduct of operations by military commanders. This view is strengthened by the declaration contained in Article I, that "the high contracting parties will issue to their armed land forces, instructions which shall be in conformity with the 'regulations re-

<sup>9</sup> This interpretation is that adopted by the German Government in its official *Weissbuch, Über die Ergebnisse der im Jahre 1907 in Haag Abgehalten Friedenskonferenz*, p. 7.

<sup>10</sup> This is the view expressed by General Geo. B. Davis in his *Elements of International Law*, p. 578; see also an article by him entitled "Amelioration of the Laws of War on Land," *American Journal of International Law*, Vol. II, p. 70. See also Trotter, *Effect of War on Contracts During War*, supp. 1915, p. 20, who remarks that the provision in question does not affect the ancient rule of the common law, that an alien enemy, unless with special license or authorization of the Crown, has no right to sue in the King's courts during war. See also Higgins' *Hague Peace Conferences*, p. 235; Cobbett's *Cases on International Law*, Part II, pp. 85-86; Holland, *Law Quarterly Review*, Vol. 28, p. 94; Huberich, *op. cit.*, p. 45; and Picciotto, *Yale Law Journal*, 27:170 (1917).

specting the laws and customs of war on land' annexed to the present convention." The logical inference, therefore, is that Article 23(h) is one of the "regulations respecting the laws and customs of war on land,"<sup>11</sup> and not a general rule of conduct for states in respect to the administration of justice.

The view of the British Government regarding the meaning of the clause was expressed by the Foreign Office in a letter of March 27, 1911, to Professor Oppenheim in response to an inquiry addressed by him on February 23 to the British Secretary of State for Foreign Affairs. Professor Oppenheim in his letter of inquiry called the attention of Sir Edward Grey to the fact that the interpretation which had been placed upon the clause by continental writers generally and even by some English and American authorities, a number of whom he cited, was in conflict with the old English rule. It was unfortunate, he added, that neither the English blue book relative to the Second Hague Conference<sup>12</sup> nor the official *procès verbale* of the conference indicated what was the purpose or intent of the provision. In its reply the Foreign Office, arguing mainly from the position which the article occupies in the text of the Convention, rejected the Continental interpretation and maintained that the article had no effect on the old English rule regarding the incapacity of enemy aliens to sue.<sup>13</sup>

<sup>11</sup> Professor Holland in commenting on this article (*Law Quarterly Review*, Vol. 28, pp. 94 ff.), remarks that "if this clause is intended only for the guidance of an invading commander it needs careful redrafting; if, as would rather appear, it is of general application, besides being quite out of place where it stands, it is so revolutionary of the doctrine which denies to an enemy any *persona standi in judicio* that although it is included in the ratification of the Convention by the United States on March 10, 1908, and the signature of the same on June 29, 1908, by Great Britain, it can hardly, till its policy has been seriously discussed, be treated as rule of international law." In his *Laws of War on Land*, p. 5, Professor Holland cites this paragraph as an instance of the inconvenience of intermixing rules relating to the duties of belligerent Governments at home with those intended to serve for the guidance of armies in the field.

<sup>12</sup> Parliamentary Papers, Misc. No. 4, 1907.

<sup>13</sup> Professor Oppenheim's letter and the reply of the British Foreign Office are printed in French in an article by M. Politis in the *Revue Gén. de Droit Int. Pub.*, 1911, pp. 250 ff. See also Trotter, *Effect of War on Contracts During War*, supp., p. 14, and Spaight, *War Rights on Land*, pp. 140-141. The Foreign Office,



*Views of Continental Publicists.*—Continental writers, however, almost without exception hold the contrary view. Among those who have so expressed themselves or who apparently assume that the German interpretation referred to above is the correct one may be mentioned Bonfils,<sup>14</sup> Ullman,<sup>15</sup> Wehberg,<sup>16</sup> de Visser,<sup>17</sup> Sieveking,<sup>18</sup> Politis,<sup>19</sup> Despagnet,<sup>20</sup> Kohler,<sup>21</sup> Strupp,<sup>22</sup> Noldeke,<sup>23</sup> and Théry,<sup>24</sup> Dr. Sieveking, a German jurist, discussing the force of Article 23(h) before the International Law Association at its meeting in 1913, said:

I think there can be no doubt whatever as to the meaning of this Article: an alien enemy shall henceforth have a *persona in judicio standi* in the courts of the other belligerent for all his claims, whether they originated before or during the war; his claim shall henceforth no longer be dismissed or suspended on account of his being an alien enemy; he shall be entitled to a judgment on the merits of the case, and this judgment shall be immediately enforceable. It has been argued that this article merely conveys instructions to officers commanding in the field and in no way touches the dealings of the Home Government and the law at home. If this were so it would mean that the German delegates proposed an article devoid of any meaning. An article might just as well have been inserted saying that officers in the field are not allowed to contract alliances or to declare

in its reply to Professor Oppenheim's inquiry, stated that the English rule works automatically at the outbreak of war; "no declaration," it said, "is needed in order to make commercial intercourse with alien enemies illegal and to withdraw from them the protection of the courts. The outbreak of war, *ipso facto*, without any proclamation, abolishes, suspends, and makes inadmissible the rights of the subjects of the hostile party to institute legal proceedings."

• <sup>14</sup> *Manuel de Droit Int. Pub.*, p. 651.

<sup>15</sup> *Völkerrecht*, 2d ed., p. 474.

<sup>16</sup> Capture in War on Land and Sea, p. 8; also *Rev. de Droit Int. et de Lég. Comp.* 1913, p. 197.

<sup>17</sup> *Du caractère ennemie et de la condition des Personnes ennemies quant à l'exercice de leurs droits civils*, *Law Quarterly Review*, July, 1915, pp. 289 ff.

<sup>18</sup> *International Law Association Reports*, 1913, pp. 175-178.

<sup>19</sup> *L'Article 23(h) du Règlement de la Haye*, *Rev. Gén. de Droit Int. Pub.*, vol. 18 (1914), pp. 249 ff.

<sup>20</sup> *Cours de Droit Int. Pub.*, p. 825.

<sup>21</sup> *Zeitschrift für Völkerrecht*, 1911, p. 384.

<sup>22</sup> *Ibid.*, vol. 8, pp. 56 ff.

<sup>23</sup> *Deutsche Juristen Zeitung*, April 1, 1917, p. 374, French translation by M. Dreyfus, 44 *Clunet*, pp. 1354 ff.

<sup>24</sup> *Recevabilité des Sujets Ennemis à Ester en Justice en France*, 44 *Clunet*, pp. 480 ff.

war. Officers commanding in the field have nothing whatever to do with courts of justice, except an officer in command of an occupied district. But the rules as to the rights and duties of the army and the non-combatants in occupied territories and the administration of such territories are laid down in Articles 42 to 56 (Articles 43 and 48 in particular); and this would be saying the same thing twice over. No, this article was meant as a blow at the rule of the British law, and this intention could not have been more clearly expressed than it has been in Article 23(h).

Nevertheless, as Dr. Sieveking points out, the prohibition established by Article 23(h) relates only to land warfare and inasmuch as the great majority of cases likely to come before the British courts originate in maritime transactions the article could have only a very limited application in a war between Great Britain and some other power, even if the German view as to its meaning were admitted.

M. Politis, professor of international law in the University of Paris, in a report made to the Institute of International Law at its session in 1910, likewise expressed the view that the effect of Article 23(h) is to prohibit belligerents from interfering with the execution of contracts made before the outbreak of war and to condemn the old rule in respect to the incapacity of enemy aliens to sue in the courts of the adversary. It forbids, he says, all legislative or other measures tending to invalidate or to prevent the execution of private obligations.<sup>25</sup> In an article published in the *Revue Générale de Droit International Public* in 1911,<sup>26</sup> M. Politis reviewed at length the opinions of the text writers, all of whom, with the exception of General Davis of the United States, he says, adopt the view stated above. The only argument of any weight in favor of the view of the English Government is, he adds, that drawn from the position of clause 23(h) in the text of the convention—"an argument which is not only contrary to the plain language of the provision itself as well as the declaration of Herr Göppert in the committee, but is contrary to the whole spirit of the Hague convention which was to ameliorate the old usages of which the English rule in respect to the judicial incapacity of alien enemies is one of the most rigorous and indefensi-

<sup>25</sup> *Annuaire de l'Institut de Droit International*, T. 23, p. 268.

<sup>26</sup> Vol. 18, pp. 249 ff.

ble." It is also true, as M. Politis points out, that the official English interpretation has been condemned by a number of the leading English authorities.<sup>27</sup>

*English Interpretation of Article 23(h) During the Recent War.*—The English Government, however, during the recent war proceeded in accordance with the interpretation adopted by the Foreign Office in 1911 and the English courts followed this interpretation. The question was first presented to a British court in the case of *Porter v. Freudenberg* in 1915.<sup>28</sup> Adverting to the divergence of views among jurists as to the meaning of the clause Lord Reading said the court was clearly of the opinion that the effect was not to abrogate the old English rule.

Our view, he said, is that Article 23(h), read with the governing Article 1 of the Convention, has a very different and a very important effect, and that the paragraph, if so understood, is quite properly placed as it is placed in a group of prohibitions relating to the conduct of an army and its commander in the field. It is to be read, in our judgment, as forbidding any declaration by the military commander of a belligerent force in the occupation of the enemy's territory which will prevent the inhabitants of that territory from using their courts of law in order to assert or to protect their civil rights. For example, if the commander-in-chief of the German forces which are at the present moment in military occupation of part of Belgium were to declare that Belgian subjects should not have the right to sue in the courts of Belgium, he would be acting in contravention of the terms of this paragraph of the article. If such a declaration were made, it would be doing that which this

<sup>27</sup> Phillipson, *Effect of War on Contracts*, p. 46; Higgins, *op. cit.*, p. 263; Lawrence, *Principles*, p. 358 (who says there can be little doubt that it was intended to have a different and far wider application); and Whittuck, *International Documents*, p. xxviii. Holland also apparently takes this view, for he remarks that the clause "seems to require the signatories to legislate for the abolition of an enemy's disability, to sustain a *persona standi in judicio*. Laws of War on Land, p. 5. Some American writers also adopt the Continental interpretation, e.g., Bordwell, *Law of War*, p. 210; Gregory, *Am. Jour. of Int. Law*, Vol. II, p. 788; and Hershey, *Essentials of Int. Pub. Law*, p. 395, note 56.

<sup>28</sup> *Law Times*, Vol. 12, p. 313, 1 K. B. 857. President Monier, of the Tribunal of the Seine, in a decision of May 18, 1916 (*Wilmeth v. Daude*), without discussing the meaning of the clause declared that it was not binding on the French courts, because "an international convention cannot prevail over the contrary provisions of a municipal statute," and because the clause had been violated by Germany. See text of the decision in 43 *Clunet*, pp. 1303 ff.

paragraph was intended to make, particularly, forbidden by the solemn contract of all the States which ratified the Hague Convention of 1907. According to eminent jurists, the occupying military power is forbidden, as a general rule, to vary or suspend laws affecting property and private personal relations.<sup>29</sup> This article 23(h) has now enacted that, whatever else the occupying military power may order in the territory of the enemy which it domiciles, it shall not henceforth declare that the right of the subjects of the enemy to institute legal proceedings in the courts of that territory is abolished, suspended, or inadmissible. If this be its true force, the enactment as an international compact is not only of high value, but it has been inserted quite naturally and appositively in the position in the section and chapter of the Annex to the convention which it occupies.

The court then referred to the fact that

On the eve of the outbreak of the war, the German Ambassador in London addressed a communication to the Foreign Office to this effect: "In view of the rule of English law, the German Government will suspend the enforcement of any British demands against Germans unless the Imperial Government receives within twenty-four hours an undertaking as to the continued enforceability of German demands against Englishmen." No arrangement, said the court, was arrived at. We refer to these two incidents not because either of them can affect our judgment on the question of the interpretation of Article 23(h), but because it is right that it should be made quite clear to everyone that as early as the spring of 1911 the view of the British Government as to its true interpretation was made public to the world, and that the situation was perfectly well understood by the German Government.<sup>30</sup>

*Right to Sue as Plaintiffs Affirmed.*—The decision in *Porter v. Freudenberg*, however, involved only the interpretation of a clause in the Hague convention. It did not affirm that the British courts were in fact closed to enemy aliens under all circumstances. There were at the time three classes of such persons in England: (1) prisoners of war in the strict sense of the term; (2) prisoners of war in a wider sense including those who were residents or who were temporarily sojourning there at the beginning of the war and who had been imprisoned for one reason or another, and (3) interned

<sup>29</sup> Here he quoted Hall, *International Law*, 6th ed., p. 465.

<sup>30</sup> A South African Court adopted the same view of the meaning of the article. *Labuschagne v. Maaburger*, So. Afr. L. R. (1915), Cape 423.

civilians. The Home Secretary stated in the House of Commons on November 26, 1914, that although all three classes were prisoners of war, the third class were in a different position from those belonging to the other two classes.<sup>31</sup> They were voluntarily in England by license of the Crown and were entitled to the protection of the law even though they were prisoners of war. They belonged to the category of persons referred to in the case of *Wells v. Williams* as being under the protection of the Crown and were therefore entitled to bring actions in the courts. On the basis of this distinction the Chancery Division in October, 1914, ruled that a Hungarian princess residing in England during the war and having properly registered in accordance with the aliens restrictions act was, although an enemy subject, entitled to bring an action for an injunction to restrain the defendant from continuing to publish certain libelous matter against her.

After adverting to the fact that there appeared to be a general impression that enemy aliens were not entitled to any relief at law in the courts of the country, Mr. Justice Sargent stated that the effect of registration was equivalent to a license to remain in the country; in fact it was a command to remain there. The law, he declared, had been correctly stated by Hall,<sup>32</sup> who says:

When persons are allowed to remain either for a specified time after the commencement of the war or during good behavior they are exonerated from the liabilities of enemies for such time as they, in fact stay as they are placed in the same position as other foreigners, except that they cannot carry on a direct trade in their own country or other enemy vessels with the enemy country.

Inasmuch, therefore, as the plaintiff is coming to insist on a right which is individual to herself, she has, in my opinion, by virtue of her registration and by virtue of the permission thereby granted her to reside in this country a clear right to enforce that right in the courts of this country, notwithstanding the existence of the state of war.<sup>33</sup>

<sup>31</sup> Interned Alien Enemies, *Law Quarterly Review*, April, 1915, p. 162.

<sup>32</sup> International Law, 6th ed., p. 388.

<sup>33</sup> *Princess Thurn and Taxis v. Moffitt*, 1 ch. 58 (1915). The Irish and Scotch Courts adopted this view in several cases. See Trotter, *op. cit.*, pp. 122-124. So did the courts of Canada. See especially the case of *Viola v. McKenzie, Mann & Co.* (1915), 24 Quebec B. R. 31; others are cited by Borchard in *Yale Law Journal*, 27:107, and by Huberich, *op. cit.*, p. 200.

In the above-mentioned case the plaintiff was not an interned prisoner of war. Her position was therefore somewhat different from that of the plaintiff in the case of *Schaffenius v. Goldberg*<sup>34</sup> where the plaintiff was an interned civilian prisoner who had long resided in England and who had duly registered under the Aliens Restriction Act. In the latter case the question was presented to the Chancery Division whether the internment as a prisoner, of an enemy alien, operated to revoke the license to remain in the country—such license being implied by registration under the Aliens Restriction Act—and therefore to deprive him of the protection of the Crown. The court held that internment had no such effect, but on the contrary, rather strengthened the license; consequently the plaintiff was entitled to bring an action to enforce a contract entered into between him and a British subject after the internment of the plaintiff.<sup>35</sup> After advert- ing to the recent decision in the case of the *Duchess of Sutherland*<sup>36</sup> where it was held that an enemy alien resident in an allied or neutral country could sue in a British court the Court of Appeal said it followed, *a fortiori*, that such a person, if resident in England, and especially if interned, could equally maintain an action. "In a case like the present," the Court said, "where the plaintiff is effectually prevented from leaving this country, there is no reason of state or public policy why the principle just alluded to should not be given full effect. The case would be quite different if the plaintiff were to remove to enemy territory. He would then become an enemy in the full sense, no longer able for the duration of the war to enforce his civil rights, or sue, or proceed in the civil courts of the realm."<sup>37</sup>

The argument advanced by the defendant that internment was equivalent to the revocation of the license to remain, which was implied by the requirement of registration, Mr. Justice Younger held

<sup>34</sup> 1 K. B. 184 (1916), and *Solicitors Journal and Weekly Reporter*, 60:8.

<sup>35</sup> Compare the case of *Nordman v. Rayner*, 33 T. L. R. 87 (1916), which was also a case of "innocent" internment.

<sup>36</sup> 31 L. T. R. 248.

<sup>37</sup> The case would also probably have been different if it had not been a case of "innocent" internment, that is, if the plaintiff had been interned on account of some overt hostile act. Compare *McNair, Alien Enemy Litigants*, 34 *Law Quarterly Review*, 135.

to be inadmissible. He then referred to the decision in the case of the *Princess Thurn and Taxis v. Moffitt* where it was said that the permission to remain really amounted to a command not to depart without special leave, from which it was clear more than ever that internment was merely a further security that the command would be obeyed. In that case the plaintiff was not interned as a prisoner of war, though she was registered. If she was allowed to bring an action there was no reason for denying the privilege to an interned enemy alien. In short, internment did not alter the position of a registered alien. The danger of allowing an enemy alien to sue would, if anything, be less when he was interned than if left at large.

It is true in a very real sense, said the court, that the plaintiff is a prisoner of war,<sup>38</sup> but it would indeed be strange if that circumstance, without more, should have the extraordinary effect upon his rights attributed to it. It is common knowledge amongst us that the internment of a civilian enemy does not necessarily connote any overt hostile attitude on his part.<sup>39</sup>

*Effect of the Decision.*—The decision in *Schaffenius v. Goldberg* marked a very important relaxation from the rigor of the old rule and was strongly approved by fair-minded persons in England.<sup>40</sup> It was in accord with the most elementary notions of justice and humanity. So long as enemy subjects were allowed to remain in England it was necessary to allow them legal means of enforcing the payment of debts due them, to say nothing of other contracts. When they were interned in concentration camps and their property and business placed in the hands of custodians and controllers it would have been a gross hardship to deprive them of the legal remedy of obtaining the necessary means of subsistence. In consequence of the internment of practically the entire enemy alien population the effect of the decision was to open the English courts to the great mass

<sup>38</sup> The Divisional Court in the Case of *Rex v. Liebmann* had held that the internment of a civilian of enemy nationality made him a prisoner of war.

<sup>39</sup> Upon appeal the view and reasoning of the Divisional Court were affirmed by the Court of Appeals.

<sup>40</sup> See, e.g., the *London Solicitors Journal and Weekly Reporter*, Vol. 59, p. 761. See also the favorable comment by a French writer, in 43 *Clunet*, pp. 435 ff.

of enemy subjects left in England. The rule thus laid down was followed by the courts in other similar cases.<sup>41</sup> With a few exceptions the only enemy aliens to whom the courts were closed were those residing in enemy territory.<sup>42</sup> The Court of Appeal even held that a company registered in England, even if all its shareholders except one were enemy subjects resident in enemy territory, could maintain an action in an English court, but this holding was overruled by the House of Lords.<sup>43</sup>

Nevertheless, the right of action thus recognized was contested by high legal authority. It was asserted, for example, that the case of *Wells v. Williams*, upon which the recent decisions were mainly based, was not strictly an analogous case. That case involved the right of a French subject who came into England during the war between England and France without a safe conduct. Yet he came with the permission of the King and with the promise of his protection, whereas in the recent cases the plaintiffs had not been invited to come and no express promise of protection had been made. If there was any such promise it existed only by the broadest implication.

It was also pointed out that the decisions were not in accord with the later cases of *Alciator v. Smith* (1812) and of *Alcinous v. Nigreu* (1854) in both of which enemy aliens were denied the right to sue in British courts. At the outbreak of the wars of 1812 and 1854 there

<sup>41</sup> For example, in the case of *Gow & Co. v. The Bank of Scotland*. See the *Law Times* of October 2, 1915. Other cases are cited in Huberich, p. 209. In the case of *Schaffenius v. Goldberg* the contract in question was entered into after the outbreak of the war. In the case of *Mayer v. Finksibler* it was held that a contract entered into between two parties before the outbreak of the war, one of whom was subsequently interned as an enemy alien, was unaffected, and the latter's right to sue for its enforcement remained. Picciotto, article cited, p. 169.

<sup>42</sup> Persons voluntarily residing in enemy territory were not allowed to bring actions in the English courts. See the case of *Scotland v. South African Territories, Ltd.*, *Law Times*, 142:366 (1917).

<sup>43</sup> *Continental Tyre & Rubber Co. v. Daimler*. 1 K. B. 893 and 2 A. C. 307 (1916). The High Court of Australia held, in the case of *Welsbach Light Co. v. Commonwealth*, 22 Com. L. R. 268 (1916), that domestic corporations controlled by enemy directors or shareholders were enemies and could not therefore sue; but in *Amorduct Mfg. Co. v. Defries & Co.*, 31 T. L. R. 69 (1914), it was held that a company registered in England might sue, although nearly all of the shares were held by enemy aliens.



had been no invitation to enemy aliens to remain as there had been in 1696 upon the outbreak of the war with France. Nevertheless in the *Alciator* case the plaintiff had been under a régime of registration similar to that of the recent war. But the court held that the fact of registration was not to be regarded as a license.<sup>44</sup>

*Writ of Habeas Corpus Denied to Interned Enemy Aliens.*—The question whether a writ of *habeas corpus* could issue to an interned German civilian was raised by the case of *Rex v. Supt. of Vine Street Police Station ex parte Liebmann*.<sup>45</sup> The Crown contended that the applicant being a prisoner of war the writ could not issue. The court held, on the authority of *ex parte Weber*,<sup>46</sup> that he was an enemy alien, and having regard to the fact that spying had become the hall mark of German kultur, a person of German origin who had obtained a discharge from his German nationality but resident in the United Kingdom, who in the opinion of the executive is a person hostile thereto and is on that account interned may properly be described as a prisoner and not therefore entitled to the writ.

Turning to the question as to whether the applicant was in the position of a prisoner of war, Mr. Justice Bailhache said:

It is at first sight somewhat startling to be told that a civilian resident of this country, interned by the police on the instructions of the Home Secretary, can be accurately described as a prisoner of war. One generally understands by a prisoner of war a person captured during warlike operations by the naval or military forces of the Crown, or, perhaps, a civilian arrested as a spy. I think, however, that the courts are entitled to take judicial notice of certain notorious facts which may be summarized thus: There are a large number of German subjects in this country. This war is not

<sup>44</sup> Compare an editorial in the *Law Magazine and Review*, for July, 1915, pp. 215 ff., where the recent decisions that an enemy alien who has not been expelled but is subject to internment or registration is in England by license and therefore entitled to the privilege of suing, is severely criticised. See also Baty & Morgan, *War; Its Conduct and Legal Results*, pp. 254, 269.

<sup>45</sup> 1 K. B. 268 (1916).

<sup>46</sup> 1 K. B. 280 (1916). In this case an application for a writ of *habeas corpus* by a German residing in England who claimed that he had lost his German nationality by long absence and who was not therefore an enemy alien, was denied on the ground that he had not produced sufficient proof of his loss of nationality. This decision was affirmed by the Court of Appeal and later by the House of Lords, 1 A. C. 421 (1916).

being carried on by naval and military forces only. Reports, rumors, intrigues, play a large part. Methods of communication with the enemy have been entirely altered and largely used. I need only to refer to wireless telegraphy, signalling by lights, and the employment, on a scale hitherto unknown, of carrier pigeons. Spying has become the hall mark of German kultur. In these circumstances a German civilian in this country may be a danger in promoting unrest, suspicion, reports of victory, in communicating intelligence, in assisting the movement of submarines and Zeppelins, a far greater danger, indeed, than a German soldier or sailor.

In a contest with people who consider that the acceptance of hospitality connotes no obligation and that no blow can be foul, it would, I think, be idle to expect the executive to wait for proof of an overt act or for evidence of an evil intent. In my opinion this court is entitled to take judicial cognizance of these matters, and in a question so greatly involving the security of the realm to say that where the Crown in the exercise of its undoubted right and duty to guard the safety of all represents to this court that it has become necessary to restrain the liberty of an alien enemy within the kingdom, and accordingly within the terms of the notice served in this case, to intern such alien enemy as a prisoner of war, he must be regarded for the purpose of a writ of *habeas corpus* as a prisoner of war.

Inasmuch as practically the entire enemy alien population was interned the effect of this decision was to deprive all enemy aliens with a few exceptions of the benefit of the writ.

*Right of a Firm Domiciled in Germany to Sue Denied.*—In the case of *Re Mehelin Hemcoth, Limited*, a firm composed of three partners, all Germans resident and domiciled in Germany and having its principal place of business in Germany, but having a branch house in Manchester, the question was raised as to the right of an enemy company to bring an action in a British court to recover for goods sold and delivered to British subjects. The plaintiffs pleaded that since their Manchester business was a branch house they were entitled, under the proclamation of September 9, 1914, to bring the action even though they were enemy subjects. Without deciding whether a license issued to an enemy branch house to trade included the right to sue, the court held that there was nothing in the proclamation which enabled the plaintiffs to recover, where otherwise as alien enemies they could not do so. The proclamation, it was said, did not enable an alien enemy to sue in respect of obligations incurred be-

fore the war and they were not suing in respect of any transactions authorized by the proclamation.<sup>47</sup>

*Right of Enemy Aliens to Defend Actions Against Them.*—Regarding the right of an enemy subject to appear and defend an action brought against him by a British subject, there appears to have been little or no judicial authority before the recent war.<sup>48</sup> The right of an enemy to defend an action had, however, been affirmed by the United States Supreme Court in the *McVeigh* case.<sup>49</sup> The question was first raised and disposed of during the recent war in the case of *Robinson & Company v. Continental Insurance Company of Mannheim*, decided in 1915.<sup>50</sup> The pleadings in the suit had been concluded before the outbreak of the war and after the beginning of hostilities it was contended on behalf of the defendants that under the common law all actions between British subjects and enemy aliens were suspended by the outbreak of war and that consequently an enemy alien could not be heard as a defendant. Mr. Justice Bailhache affirmed, however, that this contention was at variance with the decision of Lord Erskine in *ex parte Boussmaker*<sup>51</sup> where it was held that an enemy alien could appear in bankruptcy proceedings to protect his right to a dividend. There was abundant authority, he said, for the view that an enemy alien could not appear as a plaintiff if objection was made by the defendant, but it did not follow that the converse was true. There were good reasons, he went on to say,

<sup>47</sup> *Law Times*, May 8, 1915, p. 25.

<sup>48</sup> Schuster, *Effect of War and Moratorium on Commercial Transactions*, p. 13. In actions against enemy aliens by British subjects for the enforcement of contracts the defense of alienage on the part of the defendant has long been regarded with disfavor by the English courts even when the suit involved intercourse with the enemy. Lord Kenyon pronounced it an "odious plea" and declared that whoever sets it up must produce the clearest evidence that the defendant is by nationality or domicile an enemy. A case involving this question during the recent war was that of *Schmitz v. van der Veen* (K. B. Div. 112, T. L. R. 99, 1915), where the court overruled the plea of the defendant that being an enemy alien he could not be made the object of a suit at the instance of a British subject. The plaintiff, it was held, was entitled to recover on a contract made before the war, and there was no common law rule which suspended such contracts. So in the case of *Halsey v. Lowenfeld*, the King's Bench Division held in 1916 that an action might be maintained against an enemy subject for arrears of rent accruing after the outbreak of war. 1 K. B. 143 (1916).

<sup>49</sup> 11 Wall. 259.

<sup>50</sup> 1 K. B. 155 (1915).

<sup>51</sup> 13 Ves. 71 (1806).

why an enemy alien might be denied the right to appear as a plaintiff to enforce rights which but for the war he would be entitled to enforce for his own advantage and to the detriment of English subjects, but "to hold that a [British] subject's right of suit is suspended against an enemy alien would defeat the object and reason of the suspending rule; in short, the effect would be to convert that which during war is a disability, imposed upon an enemy alien because of his hostile character, into a relief from the discharge of his liabilities to British subjects. To allow an action against an enemy alien and to refuse to allow him to appear and defend himself would be opposed to the fundamental principles of justice."<sup>52</sup>

Justice Bailhache said:

Prima facie there seems no possible reason why our law should decree an immunity during hostilities to the alien enemy against the payment of just debts or demands due to British or neutral subjects. The rule of law suspending the alien enemy's right of action is based upon public policy, but no considerations of public policy are apparent which would justify preventing the enforcement by a British or neutral subject of a right against the enemy.

Once the conclusion is reached that the alien enemy can be sued, it follows that he can appear and be heard in his defense and may take all such steps as may be deemed necessary for the proper presentment of his defense. If he is brought at the suit of a party before a court of justice he must have the right of submitting his answer to the court. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's courts in the administration of justice.

Turning then to the question as to whether an enemy alien who in a lower court may appeal to a higher tribunal, Mr. Justice Bailhache said:

Equally it seems to result that, when sued, if judgment proceed against him, the appellate courts are as much open to him as to any other defendant. It is true that he is the person who may be said in one sense to initiate the proceedings in the appellate court by

<sup>52</sup> There is no rule of common law, said the *London Solicitors Journal and Weekly Reporter* (October 23, 1914, p. 7), which suspends an action in which an alien is a defendant and no rule of common law which prohibits him from appearing and conducting his defense. "Whatever may be the extent of the disability of an alien enemy to sue in the courts of a hostile country," said the *London Times* of October 17, 1914, "it is clear that he is liable to be sued, and this carries with it the right to use all means and appliances of defense."

giving the notice of appeal, which is the first necessary step to bring the case before the court, but he is entitled to have his case decided according to law, and if the judge in one of the King's courts has erroneously adjudicated upon it, he is entitled to have recourse to another and an appellate court to have the error rectified. Once he is cited to appear he is entitled to the same opportunities of challenging the correctness of the decision of the judge of first instance or other tribunal as any other defendant.<sup>53</sup>

The right of an alien enemy to appear as a defendant was affirmed by the court of appeal in the case of *Porter v. Freudenberg*.<sup>54</sup> This was a case in which a British subject brought an action against a German subject to recover rent due on a lease made in 1903. The defendant resided in Berlin but had a branch house in London. "To allow an alien enemy to sue or proceed during war in the civil courts of the King," said the court, "would be, as we have seen, to give to the enemy the advantage of enforcing his rights by the assistance of the King with whom he is at war. But to allow the alien enemy to be sued or proceeded against during the war is to permit subjects of the King or alien friends to enforce their rights with the assistance of the King against the enemy."<sup>55</sup>

<sup>53</sup> Compare also the case of *Ingle v. Mannheim Ins. Co.*, 1 K. B. 227 (1915), and the comment in the *Solicitors Journal and Weekly Reporter*, November 7, 1914. In this case the King's Bench Division held that the Trading with the Enemy proclamation of October 8, 1914, did not prevent a British subject from receiving money from or suing an enemy alien where the right to be paid or to sue had accrued before the defendant had acquired the status of an enemy alien.

<sup>54</sup> *Times Law Rep.*, Vol. 112, p. 313; 1 K. B. 857 (1915) and *Solicitors Journal and Weekly Reporter*, January 23, 1915, p. 216.

<sup>55</sup> Schuster (Effect of War and Moratorium on Commercial Transactions, p. 3) calls attention to one possible practical difficulty which enemy defendants had to face in England, namely the difficulty of obtaining the services of solicitors owing to the fact that there was some doubt as to whether an English solicitor might lawfully defend the case of an enemy alien. The suggestion was made during the prize court hearing in the case of the *Möwe* that perhaps solicitors were debarred by the Trading with the Enemy Act from defending enemy aliens. Clause 5 of the Act of 1914 forbade British subjects from entering into any commercial, financial or other contracts or obligations with an enemy alien. But the *Solicitors Journal and Weekly Reporter* of November 7, 1914 (p. 35), expressed the view that the prohibition in question was not intended to apply to professional relationships and therefore the hiring of solicitors was no more illegal than the employment of a physician. "We have by this time," said the editor, "advanced too far to say that an alien enemy is entirely without rights unless that is laid down absolutely, unless, that is, we relapse

The rule laid down in the above-mentioned cases that an enemy alien who was sued by a British subject was entitled to appear and defend the action was, however, the subject of criticism by high English authority, on the ground that it was inconsistent with the old doctrine of the suspension and cancellation of contracts, as well as contrary to the reason on which non-intercourse with the enemy is forbidden.<sup>56</sup> But it appears to be based on good sense and is in harmony with elementary notions of justice.<sup>57</sup>

into the *ex lege* doctrine. Aliens must be entitled to legal assistance and we incline to think that the legal profession would fail of its boasted traditions if it refused assistance." In fact, the difficulty appears not to have been serious, for members of the English bar freely gave advice to enemy aliens.

A more serious practical difficulty in suing an enemy was the problem of serving process on him. The English courts met the difficulty to some extent by allowing substituted service of notices on agents in England or Holland where there was reason to believe that knowledge of the proceedings would be transmitted to the principal. Lord Justice Scrutton in 34 *Law Quarterly Review*, 124.

<sup>56</sup> For example, by Baty and Morgan, *War: Its Conduct and Legal Results*, p. 288. These authors as well as others contend that the authority of the U. S. Supreme Court in the *McVeigh* case is not applicable in an international war. Moreover, they add, the opinion of the court in that case, so far as it related to the right of an enemy alien to be sued, was *obiter dicta*, since the defendant was not in fact an enemy alien, the parties being enemies only in a technical sense. Both were in fact citizens of the United States and could not be "kept out of the courts of the United States." The *London Solicitors Journal and Weekly Reporter* of January 23, 1915 (p. 212), criticised the decision in *Robinson v. Continental Insurance Co. of Mannheim*, as being "a singular mixture of ancient law and modern ideas" because it held that an enemy alien cannot sue unless he is resident in England and registered or interned or unless he turns himself into an English company, although he may be sued and subject to an exception, may take an appeal to a higher court. Mr. E. G. Roscoe in a letter of October 27, 1914, to the editor of the *Solicitors Journal* (59:23) ventured the opinion that the ruling in this case was inconsistent with the opinion of Sir William Scott in the case of the *Hoop*. "I do not say," Mr. Roscoe adds, "that the principles laid down by Mr. Justice Bailhache are not eminently desirable, but are they actually in accordance with the principles of English law as hitherto laid down?" To this communication the editor replied that Sir William Scott was dealing with the right of an enemy alien to sue as a plaintiff and not as a defendant, and therefore his remarks regarding the incapacity to sue could not be interpreted as denying the right of defense (*Ibid.*, October 31, 1914, p. 20).

<sup>57</sup> Compare the Views of Picciotto, article cited, p. 173, and of Lord Justice Scrutton, *The War and the Law*, 34 *Law Quarterly Review*, 123.

*Practice of the Prize Court in Respect to Enemy Claimants.—*

The question as to the right of a non-resident enemy subject to appear as a claimant in prize proceedings and to defend his claim was passed upon by the President of the British prize court in the case of the *Möwe* decided on November 9, 1914.<sup>58</sup> Sir Samuel Evans held that although no legal right to appear and defend existed, he would, in the exercise of the power which belonged to the court to adopt rules of practice, allow enemy claimants to appear and defend any right claimed under the Hague Convention respecting the treatment of enemy merchant vessels found in port at the outbreak of the war. Counsel for the claimants argued that they were not plaintiffs claiming the restitution of the ship, but defendants seeking to avoid condemnation and they cited numerous authorities, English and American, in support of the right of an enemy subject to appear in court as a defendant.<sup>59</sup>

Sir Samuel Evans reviewed at length the practice and jurisprudence during the Crimean, Spanish-American and Russo-Japanese wars, in all of which enemy claimants were allowed to appear in prize proceedings but only because there were special circumstances which *pro hac vice* suspended their enemy character for the purpose of suing.<sup>60</sup> In the present case, however, there was no coming *pro hac*

<sup>58</sup> Trehern, *British and Colonial Prize Cases*, Vol. I, pp. 60 ff. The question had already been raised in the cases of the *Chili* and the *Marie Glaeser*, but a ruling on the merits of the question was not necessary to the judgment.

<sup>59</sup> Among others, the English cases of *Janson v. Dreifontein Consolidated Mines Company* (1902), *Robinson v. Continental Insurance Company of Mannheim* (1914), and the American case of *McVeigh v. the United States*, 11 Wall. 259.

In the argument in the *Möwe* case, both counsel for the claimant and the Attorney General argued in favor of the right of an enemy alien claimant to appear and defend his claim. The Attorney General even went to the length of suggesting that in case the existing law did not allow such a right, the Government would be prepared to issue an order in council expressly authorizing it.

<sup>60</sup> Among the American cases cited in which enemy persons were allowed to appear in prize courts and assert their claims were the *Pedro*, 157 U. S. 354 (1899), the *Guido*, 175 U. S. 382 (1899), the *Buena Ventura*, 175 U. S. 384 (1899), the *Panama*, 176 U. S. 535 (1900), and the *Paquette Habana*, 175 U. S. 677 (1900). Among the Japanese cases were the *Tetartos*, 1909, Hurst & Bray, *Russian and Japanese prize cases* (Vol. I, p. 166), the *Ekaterinoslav*, 1905

*vice* within the King's peace, no suspension of the hostile character and he was satisfied that neither Lord Stowell nor Dr. Lushington would have allowed an enemy owner to appear to assert a claim in a case similar to this.

Nevertheless, permission to an enemy to sue was not a matter of international law but of court practice and he thought the prize court had the inherent power to regulate its own practice unless prohibited by law. Lord Stowell did so from time to time and his right was not questioned.

"A merchant," said Sir Samuel, "who is a citizen of an enemy country would not unnaturally expect that when the state to which he belongs, and other states with which it may unhappily be at war, have bound themselves by formal and solemn conventions dealing with a state of war, like those formulated at the Hague in 1907, he should have the benefit of the provisions of such international compacts. He might also naturally expect that he would be heard, in cases where his property or interests were affected, as to the effect and results of such compacts upon his individual position."

In view of these considerations and in order "to induce and justify a conviction of fairness, as well as to promote just and right decisions," Sir Samuel announced that he would direct that whenever an enemy subject conceived that he was entitled to any protection, privilege or relief under any of the Hague Conventions of 1907 he would be allowed to appear as a claimant and argue his claim before the court.<sup>61</sup>

(*ibid.*, II, 1), the *Mukden*, 1905 (II, 12), the *Rossia*, 1905 (II, 39), the *Argun*, 1905 (II, 46), the *Manchuria* (II, 52), the *Lesnik* (II, 92), the *Kobik* (II, 95), the *Thalia* (II, 116), and the *Oriel* (II, 534).

<sup>61</sup> The British prize court in Egypt adopted the same rule in the case of the *Gutenfels* (Treher's Cases I, 102). Judge Cator in his opinion declared the old rule to be a "barbarous one which runs counter to all sense of natural justice and it seems strange that it should be found embodied in the practice of any English prize court. If it is right that we should insist upon hearing a man in his own defense in those courts where the parties of one nation, and the judge may be expected to be quite indifferent as to which suitor should succeed, it seems to me to be still more important that the enemy party should be heard in a prize court when the crown claims condemnation of his ship and the judge's sympathies must be supposed to be in favor of his own country. It is much to be regretted that this question did not occupy the attention of



It will be seen that the doctrine here laid down by the British prize courts is theoretically in accord with the old rule, for it denies the legal right of an enemy subject to appear as a claimant and defend his claim to property in the custody of the prize court. The concession here granted was in fact limited to those only who claimed rights under the Hague Conventions, and even it was accorded as an act of grace on the part of the court and might be withdrawn at any time in the discretion of the judge. The decision therefore did not go to the length to which the King's Bench division and the Court of Appeal went in the cases referred to above. It is submitted that the prize court might have gone further, overruled the ancient doctrine and laid down the broad principle that enemy subjects have a right to be heard not only when they assert claims under the Hague Convention but also for any other reason.<sup>62</sup>

*Legislation and Practice in the United States.*—Section 7, paragraph b, of the Trading with the Enemy Act of October 6, 1917, declared that nothing in the said Act should be deemed to authorize the prosecution of any suit or action at law or in equity in any court "within the United States" by an enemy or an ally of an enemy prior to the end of the war, provided that such person if licensed to do business under the act might prosecute any suit arising solely out of such business transacted in the United States and any enemy or ally of an enemy might defend by counsel any suit or action brought against him. Receipt of notice from the President to the effect that he had reasonable ground to believe that any person was an enemy or an ally of an enemy should be *prima facie* defense to any one re-

the Hague Conference. I have little doubt what the opinion of the Conference would have been, and feel sure that most of the delegates would have been surprised that in a British Prize Court the owner of captured property has no right to present his case against the Crown if he be an alien enemy."

Speaking of the old practice Judge Cator said: "The fact is, the rule is a bad rule, much more to be honored in the breach than in the observance; and if we must acknowledge ourselves to be so far fettered by the dead hand of outworn precedent as to recognize its continued existence, I am, at any rate, determined to permit all such breaches of it as my sense of equity and fair dealing towards the enemy may demand."

<sup>62</sup> It is refreshing to find the *London Solicitors Journal and Weekly Reporter* advocating this view. See the issue of November 14, 1914.

ceiving the same, in any suit or action brought by such person and based on failure to complete or perform since the beginning any contract or other obligation. By section 10, paragraph g, enemy subjects were empowered to bring and prosecute suits in equity against any person other than licensees to enjoin infringements of patents, trade marks, prints, labels and copyrights in the United States, owned or controlled by such persons, provided that no final judgment or decree might be entered in their favor except after thirty days notice to the alien property custodian. The full import of Section 7, paragraph b, is not quite clear. It conferred upon enemy subjects who had licenses to do business in the United States the right to sue in respect to issues arising out of such business but it conferred no such right upon other enemy persons, although it did not expressly prohibit them from suing. Nevertheless, as they are prohibited by a common law rule from bringing actions, express authority to do so would probably be necessary. The section referred to speaks of "any court within the United States," but it may be doubted whether Congress may prohibit an enemy alien from suing in a state court. Two points, however, are clear, namely, that enemy subjects might defend actions brought against them but that they could not bring actions in respect to unperformed contracts against any one in the United States. Several cases involving the right of Germans to sue in the state courts arose in 1917. In the case of *Posselt v. D'Espard*<sup>63</sup> a court of Chancery in New Jersey declined to stay a suit brought by a person erroneously assumed to be a German subject, resident in the United States, and the manager of a corporation, a majority of the stock of which was owned by a German corporation for the preservation of the rights of the complainants as stockholders in a New Jersey Corporation.<sup>64</sup>

<sup>63</sup> 100 Atlantic Reporter, 893 (1917).

<sup>64</sup> The court said, *inter alia*, "The solution of the problem now before me, I think, is found in the President's message to Congress, which in view of the nature of its reception by Congress and the action of Congress under it has become the voice of the country; and the President's proclamation declaring a state of war and defining rights of residents, an official act under authority of Congress. German residents who comply with needful regulations and who properly conduct themselves are assured that they will be undisturbed in the

The New York Supreme Court declined to follow the decision of the English House of Lords in the *Continental Tyre & Rubber* case and held that a New Jersey corporation, a large majority of the shares of which were owned by a German corporation and a German subject resident in Germany, was an entity separate and distinct from its stockholders and was therefore entitled to maintain an action. After reviewing the American cases at length the court reached the conclusion that the decisions were practically unanimous in regarding a corporation as a thing apart from its incorporators and that the rule laid down by the House of Lords was not in accord with American precedents. Therefore, a corporation, created under the laws of any one of the States could not be deprived of access to the courts for the protection of its legal rights, notwithstanding the fact that a large majority of the individual stockholders were enemy subjects resident in enemy territory.<sup>65</sup>

In a suit brought by German subjects resident in Germany to recover money due them by an American firm, before the declaration of war, however, the United States District Court directed the proceedings to be suspended rather than dismissed, until the restoration of peace.<sup>66</sup>

A motion to dismiss a complaint filed by a resident enemy or to stay proceedings was denied by the Supreme Court of New York. There was nothing in the Trading with the Enemy Act, said the Court, which was applicable to the case and there was no evidence that it was the intention of Congress or the President to deny to the plaintiff the exercise of the same civil rights enjoyed by neutral aliens. The Court added:

With only a few exceptions the nations of all the earth both advocate and practice many ameliorations of the acerbities of war. In that endeavor this nation is not backward. No limitation is peaceful pursuit of their lives and occupations and be accorded the consideration due all peaceful and law-abiding persons, except so far as restrictions may be necessary for their own protection and for the safety of the United States. To shut the door of the court in the face of an alien enemy resident here would be a distinct violation of not only the spirit but the letter of this proclamation."

<sup>65</sup> *Fritz Schultz, Jr., v. Raimes & Co.* (1917) 166 N. Y. supp. 567. The leading Federal case upon which the court relied was *Bank of U. S. v. Deveaux*, 5 Cranch U. S. 61.

<sup>66</sup> *Plettenberg, Holthaus & Company, v. Kalmon & Company*, 241 Fed. Rep. 605.

placed upon the freedom of resident subjects of a foreign State with which we are at war, unless that limitation is deemed necessary to withhold from that enemy the aid or comfort which may advance his cause. Mere technical or arbitrary rules are neither enacted, nor, when found in ancient usage, enforced. How could our own plans be served or those of Germany defeated or impaired by closing against the plaintiff the doors of our courts? While I should be inclined to hold that the plaintiff is entitled to maintain her action on the ground that within the purview of the Trading with the Enemy Act she is not an alien enemy engaged in trade subject to suspension by the Federal Government, I prefer to deny the motion on the broad ground that the resident subjects of an enemy nation are entitled to invoke the process of our courts so long as they are guilty of no act inconsistent with the temporary allegiance which they hold for this Government.<sup>67</sup>

There is a large amount of American case law relative to the right of enemy aliens to sue and this may be briefly summarized as follows:<sup>68</sup> An enemy subject cannot bring an action in an American court during the continuance of war nor prosecute one instituted before its commencement, but this disability applies only to a non-resident enemy and not to those who are permitted to enter or remain in the United States during the war. "A lawful residence implies protection and a capacity to sue and be sued."<sup>69</sup> Some state courts have held that where an action has been commenced before the outbreak of war the proceedings are only suspended, whereas a suit commenced after the outbreak of war will be dismissed; others have held that where the plaintiffs become enemy aliens subsequent to the institution of the suit the action should be dismissed without prejudice. The American courts have uniformly held that enemy aliens may be made defendants at the instance of American citizens who are seek-

<sup>67</sup> *Arndt-Ober v. Metropolitan Opera Co.*, 58 N. Y. Law Jour. 1347 (1918). See also the case of *Speidel v. N. Barstow Co.*, 243 N. Y., 621 (1917).

<sup>68</sup> This summary is made mainly from an article entitled "Alien Enemies as Litigants," published in *Case and Comment* for June, 1917, pp. 93 ff. This article appears to contain an exhaustive examination of the cases decided by the American courts. See also Borchard, *Right of Alien Enemies to Sue*, *Yale Law Journal*, 27:105; Huberich, *On Trading with the Enemy*, pp. 188 ff., and 194 ff., and Mitchell, in the *Maine Law Review*, November, 1917.

<sup>69</sup> *Clarke v. Morey*, 10 Johns, 69 (1813); and *Norddeutsche Ins. Co. v. Dudley*, N. Y. Law Jour., January 11, 1918.

ing to protect their property and enforce their rights but where an enemy alien is sued he is entitled to appear by attorney and be heard in his defense.<sup>70</sup> But a non-resident enemy alien cannot prosecute a counter claim.<sup>71</sup>

#### FRENCH LAW AND PRACTICE.

*Early Opinion and Practice.*—As to the right of enemy subjects to sue either as plaintiffs or defendants in the courts of France there appears to have been little judicial authority or positive legislation prior to the recent war. There was, however, a decision of the *parlement* of Douai in 1704 to the effect that a subject of an enemy power could not sue a subject of the King of France, when the latter had by decrees prohibited all relations between his subjects and those of the enemy country. There also appears to have been an "act of government" in 1803 and a decision of the Court of Cassation in 1806 affirming this principle.<sup>72</sup>

*French Legislation of 1914 and 1915.*—During the recent war no legislation expressly denying the right to sue was enacted by the French parliament or proclaimed by decree of the government, but those who adopt the view that the right to sue does not exist, either rely upon the legislation and jurisprudence of the first Empire, referred to above, which they say has never been repealed, or upon the terms of the decree of September 27, 1914, prohibiting commercial relations with the enemy and the act of parliament of April 4, 1915, which prescribes penalties for violation of the decree. Article 2 of the decree referred to declared null and void as being contrary to public policy (*l'ordre public*); every act or contract performed or entered into either in French territory or in a French protectorate,

<sup>70</sup> As was pointed out above this rule was adopted by the United States Supreme Court in the case of *McVeigh v. the United States*, 11 Wall. 259 (1870), and it has been followed by the State courts in many cases. See the cases cited in an article in 3 *Va. Law Register*, 1917, p. 102, n. 45.

<sup>71</sup> This was also the decision of the King's Bench Division in the case of *Robinson v. Continental Ins. Co.*, 31 *Times Law Reports* 20 (1915) referred to above.

<sup>72</sup> On the French practice and doctrine, see two valuable articles by Professor Jules Valéry, of Montpellier, in the *Rev. Gén. de Droit Int. Pub.*, 1916, pp. 379 ff. and in *Clunet's Journal de Droit Int. Privé*, 1915, pp. 1009 ff.

with subjects of the German or Austro-Hungarian Empires or with persons residing therein. Article 3 prohibited and declared to be null as contrary to public policy, the execution for the benefit of the subjects of the said empires or persons residing therein, of pecuniary or other obligations resulting from every act or contract done or entered into in French territory by every person prior to August 4, in the case of German subjects and prior to August 13 in case of Austro-Hungarian subjects. By a decree of November 7, 1915, the terms of the decree of September 27 were extended to apply to relations with the subjects of Bulgaria and persons residing therein.

*Denial of the Right to Sue.*—The above-mentioned prohibition in respect to contracts with enemy subjects, it was argued by the adversaries of the right to sue, applied not only to relations of a pecuniary or commercial character but also to civil contracts and relations such as are necessarily implied in judicial proceedings between Frenchmen and enemy subjects. It followed therefore that enemy subjects were prohibited from instituting or prosecuting actions in the courts of France. This was the view adopted by a number of French jurists<sup>73</sup> and by the French courts in several cases<sup>74</sup> one of the most reactionary decisions in which the right to sue was denied

<sup>73</sup> For example by Professor Valéry in the articles cited above; by M. Reulos, *Manuel des Séquestres*, p. 12, n. 1, and p. 214; by M. Courtois, in *Clunet's Journal*, T. 42, p. 509; by M. Troimaux, *Séquestres et Séquestrés*, pp. 163 ff., and by M. Théry in *Clunet*, T. 44, pp. 480 ff. Professor Valéry affirms that the judicial disability of enemy aliens was a rule of the Roman law and is equally the established doctrine of French public law. Rousseau's theory that war is a contest merely between armed forces, may, he says, have been true before 1914, but the refusal of the Germans to act in harmony with it destroyed whatever force it had acquired. He quotes Portalis and Leuder (*Holtzendorff's Handbuch*, IV, p. 358) in support of the view which he maintains. Valéry, however, appears to have admitted that an enemy subject might defend an action against him.

<sup>74</sup> Among the French courts which refused to admit enemy aliens to sue were the tribunal of Marseilles (June 22, 1915); the tribunal of Commerce of Marseilles (January 5, 1917); of Phillippeville (April 15, 1915) and the tribunal of the Seine (*référé*) May 18, 1916. Nevertheless sequestrators of enemy property could sue for the purpose of protecting the property in their custody. Actions by French creditors for the recovery of debts against sequestrated property could also be brought against the sequestrator, in which case the latter could defend the action.

was that of May 18, 1916, by President Monier of the Tribunal of the Seine (*référé*)<sup>75</sup> who interpreted the prohibition in the decree of September 27 in respect to *actes* and *contrats* with enemy subjects to embrace "judicial" acts such as are involved in retaining counsel and bringing actions in the courts.

Adverting to the contention that under Article 23(h) of the fourth Hague Convention of 1907 enemy subjects are entitled to sue in the courts of France, M. Monier asserted that "an international convention cannot prevail against a subsequently enacted municipal law which modifies its provisions and respect for which is rigorously imposed on every inhabitant of French territory,"<sup>76</sup> the "speculative theories of the law of nations" to the contrary notwithstanding. Furthermore, the above-mentioned provision of the Hague Convention was not binding on France because it had been violated by the German decree of August 7, 1914, which excluded French subjects from suing in the courts of Germany.<sup>77</sup> Not only this, but M. Monier added, the Germans had "cynically and deliberately violated all the rules imposed on belligerents by the various conventions of the Hague"; consequently the subjects of Germany were not entitled to the benefit of the law of nations in general and of the Hague Conventions in particular.<sup>78</sup> Every reason and consideration of law and fact, he concluded, was opposed to opening the courts to Germans; such liberty was in flagrant contradiction with the tendencies of opinion; it would lead in practice to serious inconveniences, possible collusions and fraud and even irreparable injury to the country.

<sup>75</sup> The case of *Wilmoth, Sequestrator v. Daude*, Text in Philly, *Jurisprudence Speciale et Législation de la Guerre*, Pt. III, pp. 225 ff., also, in Clunet, T. 43, pp. 1303 ff.; see also the case of *Wilmoth, Sequestrator, v. Société Gén. Immobilière*, December 21, 1915. Text in Reulos, pp. 355 ff.

<sup>76</sup> Professor Barthélemy (43 Clunet, 1484) remarks that this doctrine is "calculated to move the hearts of international publicists." M. Barthélemy properly adds that international conventions which have been ratified by France are binding upon all French judges.

<sup>77</sup> But as M. Barthélemy remarks the German prohibition applied only to French citizens domiciled *outside* the Empire and not at all to those resident therein. See also 42 Clunet, 567, and 43 Clunet, p. 1131, on this point.

<sup>78</sup> Compare on this point the more liberal views of Judge Cator, of the British prize court at Alexandria in the case of the *Gutenfels*, quoted above.

That enemy aliens had *no persona standi in judicio* was also the view of the council of the Order of Advocates of the Court of Paris<sup>79</sup> and of the Chamber of Solicitors (*Avoués*) of the tribunal of the Seine.<sup>80</sup>

<sup>79</sup> Resolution adopted November 30, 1915, Text in 43 Clunet, pp. 12 ff.

<sup>80</sup> Reulos, p. 215. One of the arguments advanced in support of the view that enemy aliens have no capacity to bring actions in the courts was that the employment of an attorney would involve the entering into contractual relations between the attorney and the enemy client, which was in effect forbidden by the decree of September 27. Compare Courtois and Valéry in 42 Clunet, pp. 511 and 1009. The resolution of the Council of the Order of Advocates referred to above declared that inasmuch as Germany had prohibited "all relations" with enemy subjects, it was the duty of the French bar to set an example of patriotism by refusing to take the cases of German suitors. No advocate of the Court of Paris, it was said, could advise or defend a subject of an enemy power, unless he had been authorized by the *batonnier* to do so, and this was the view of the tribunals of the Seine and of Marseilles in the cases referred to above. The contention that taking the case of an enemy client was a "contract" forbidden by the decree of September 27, was, however, vigorously attacked by Prof. Barthélemy (*L'Accès des Sujets Ennemis aux Tribunaux Français*, 43 Clunet, p. 1487) and by M. Clunet (*Concours professionnelle des avocats aux Sujets Ennemis et le Barreau de Paris*, 43 Clunet, pp. 14-15). Such an interpretation, says Barthélemy, is "purely literary, pharisaic, judaic, contrary to the intention of the legislature and in effect leads to the infliction of a sort of civil death upon enemy subjects by depriving them of their judicial personality." M. Clunet adds that enemy subjects have a right under international law and the municipal law of France to retain the services of members of the bar. He cites a number of cases in which the courts had upheld the right of enemy subjects to employ counsel and the right was affirmed by the fourth chamber of the Court of Appeal of Paris on April 20, 1916. The Court of Cassation (November 19, 1914) appears also to have admitted the right. President Monier of the tribunal of the Seine in the case referred to above, however, took occasion to say that "it was to the honor of the Paris solicitors that no one had claimed the right to defend a German" (43 Clunet, 1308). This tribunal, as well as those of Marseilles (44 Clunet, 241) and Besançon (*ibid.*, p. 248), held that the decree of September 27 prohibited all *juridical* as well as *commercial* relations with enemy subjects and that the latter could not therefore retain an attorney. A German writer, Dr. Haber, in the *Juristische Wochenschrift* of April 15, 1913 (Fr. trans. in 44 Clunet, 448 ff.) contrasting the German and French practice, remarks that if the decree of September 27 prohibited a German from hiring a French lawyer, it prohibited him from buying food or clothes from a Frenchman. M. Valéry (42 Clunet, 1009 ff.) suggested that one way out of the difficulty would be to allow enemy subjects to choose a curator *ad hoc* to represent them before the courts. The matter not having been determined by legislation it was left to the courts to deal with the question whenever it arose, each according to its own individual opinion.



*The Right to Sue Defended by High French Authority.*—The decision of the tribunal of the Seine and the doctrine of Valéry, Courtois, and others, that enemy subjects have no standing in the courts was vigorously attacked by a number of French jurists, among whom were Renault, Weiss, Clunet and Barthélemy. Professor Barthélemy in an able discussion of the question<sup>81</sup> asserts that the old doctrine enunciated by the *Parlement* of Douai in 1704 is not in accord with modern French law or practice. Modern French law, on the contrary, he says, is in favor of the right of enemy subjects to sue in the courts of France and in fact this right was recognized throughout the nineteenth century.<sup>82</sup>

The modern theory, he argues, is that war is a contest between the armed forces of states and not a struggle between peoples. Non-combatant subjects of the contesting powers are not at war with one another and, he adds, it is the duty of the French courts "to preserve in the midst of the present storm the small flame which still burns at the end of the taper of international law."<sup>83</sup> No argument, he says, can be drawn today from the principle of the civil code, which was hostile to the rights of foreigners; its doctrine is out of date, the principle of modern law being that enemy subjects must be treated as ordinary aliens are treated, subject to the precautions necessary to protect the state against injury. The state may prohibit its own nationals from entering into new juridical relations with enemy subjects and it may modify old rules whenever those relations would have the effect of increasing the resources or strength of the enemy, but to close the courts to enemy subjects and deny them the protection of the law is not justified by considerations of national defense. The purpose of judicial actions is merely to determine juridical situations; if the result of a suit in a particular case is a judgment in favor of an enemy subject and if the payment of the sum recovered would be prejudicial to the national interests, the govern-

<sup>81</sup> *L'Accès des Sujets Ennemis aux Tribunaux Français* in Clunet's *Journal*, T. 43, pp. 1473-1504.

<sup>82</sup> In support of this statement M<sup>r</sup> Barthélemy cites Merlin, *Répertoire, Sub Verbo, Guerre*; Massé, *Le Droit Commerciale*, Vol. I, p. 128 and Nys, *Le Droit Int.*, Vol. III, p. 69.

<sup>83</sup> *Ibid.*, p. 1480.

ment has only to suspend the execution of the judgment and thus protect the country against possible injury.<sup>84</sup> That is permissible but there is no sound reason for refusing to an enemy subject the privilege of having his legal rights adjudicated and determined by the courts. The power of the courts, he adds, to suspend or extinguish the legal rights of enemy subjects was forbidden by clause 23h of the fourth Hague Convention of 1907 to which France was a party, and while Germany had not strictly conformed her conduct to its provisions, she had not, as many Frenchmen seem to have assumed, closed her courts to French nationals residing in the German Empire but only to those domiciled *outside* German territory, and even these were allowed to sue with the permission of the Chancellor. Moreover the German courts were open for actions arising in connection with enemy branch houses and establishments, when the principal establishments were situated in Germany.

President Monier's contention that the prohibition laid down in clause 23h was not binding upon the French tribunals since it had been overridden by the terms of the decree of September 27 was extraordinary and unwarranted. The prohibitions of the decree of September 27 had not in fact modified the rule laid down in clause 23h nor had there been any intention so to do. That decree had reference only to *commercial* agreements or acts, and not to such relations as are involved in the bringing of judicial actions, including the employment of solicitors for the purpose of prosecuting a suit or defending an action. If the right of defense were allowed to an enemy subject who had committed a crime against a Frenchman, as it had in fact been done, and yet an innocent and unoffending German were denied the right to appear as a plaintiff against one who had committed a wrong against him, or to resort to the courts for the purpose of enforcing the terms of an unobjectionable contract, it would, as M. Barthélemy remarks, be a strange contradiction indeed. Finally, he pointed out that English practice was less rigorous than that followed

<sup>84</sup> M. Reulos (*Manuel des Séquestres*, p. 216) remarks, however, that the theory that an enemy alien shall be permitted to maintain an action in the court, but in case he obtains a favorable judgment, its execution may be suspended, rests on a subtle distinction and that in practice the right would be of no value to the enemy litigant.

by some of the French courts, for in England, interned enemy subjects—and this included practically the whole enemy population—were allowed access to the courts both as plaintiffs and defendants.<sup>85</sup>

This liberal and enlightened view, highly creditable to the distinguished jurist who enunciated it, was adopted by M. Edouard Clunet, the learned editor of the *Journal du Droit International Privé*.<sup>86</sup> M. Clunet, like M. Barthélemy, attacked the old doctrine laid down by the *Parlement* of Douai as being contrary to the fundamental theory of modern law. He admits that the right of enemy subjects to sue might be abrogated by statute, yet it had never been done by France during any of the wars of the nineteenth century to which she was a party<sup>87</sup> and it was not the intention of the decree of September 27, 1914, to do so. Like M. Barthélemy, he holds that the right to sue was guaranteed by clause 23h of the Fourth Hague Convention of 1907, and without answering the question which he himself raises as to whether the French legislature could modify the rule embodied in the Hague Conference, he was firmly of the opinion that it had not in fact done so. Finally, he pointed out that no danger to the national interests would result from the opening of the courts to alien enemies, because the government was still free to suspend the execution of any judgment or the enforcement of any decision the execution or enforcement of which would be detrimental or dangerous to the country.<sup>88</sup>

*The Right to Sue Affirmed by Some French Courts.*—In a number of cases—in fact in the majority of those in which the question was raised—the French tribunals and courts upheld the right of

<sup>85</sup> The French courts, which closed their doors to German subjects sometimes, however, showed more consideration for enemy aliens of other races. Thus a Bulgarian who had a *permis de séjour* was allowed to bring an action (Trib. of Seine, March 13, 1917, 44 Clunet, 1481), and so was an Alsatian of French origin who was provided with a tricolor card (*ibid.*, T. 44, p. 1071).

<sup>86</sup> See his article entitled *Les Sujets Ennemis Devant les Tribunaux Français Jour. du Dr. Int.*, T. 43, pp. 1089-94.

<sup>87</sup> As authority on this point he quotes Massé *Le Droit Commercial*, Vol. I, p. 128.

<sup>88</sup> For a German criticism of the French doctrine and practice, see an article by Dr. Karl Hirschland in the *Juristische Wochenschrift*, September 15, 1916, French text in 44 Clunet, pp. 87 ff. See also an article by Dr. Haber of Leipzig, in the same publication, April 15, 1916 (French trans. in 44 Clunet, pp. 448 ff.).

enemy subjects to sue both as plaintiffs and defendants.<sup>89</sup> The Council of Prizes also allowed enemy claimants to appear and defend their claims to ships and goods which were the object of prize proceedings. These decisions, so favorable to the rights of enemy aliens, however, provoked considerable criticism in France and the question was taken to the Court of Appeal of Paris, the 4th Chamber of which on April 20, 1916, rendered a notable decision upholding the right of enemy aliens to sue in the courts of France.<sup>90</sup> "This right," said the Court of Appeal, "must be considered to be one of the natural rights which foreigners enjoy in France, so long as there is no express provision to the contrary in the municipal law or international conventions." It was a right that had been secured to enemy aliens by Article 23(h) of the Fourth Hague Convention and it had not been abrogated by any law or decree of the French Government.

The decree of September 27, 1914, as every exceptional law which

<sup>89</sup> See especially the decision of the 10th Chamber of the Tribunal of the Seine in the case of *Gieb Cie. Gén. des Voitures*, January 9, 1915 (42 Clunet, pp. 62 ff. and 509 ff.); the decision of the same tribunal in the case of *Doyen, Orenstein and Kuppel* (43 Clunet, p. 974); and the decision of the Court of Appeal of Rouen, May 17, 1915 (*ibid.*, p. 1095); of the tribunal of Alger, July 22, 1915 (*ibid.*, p. 903); of the tribunal of Epinal, August 27, 1915 (*ibid.*, p. 262); of the tribunal of Nice, April 20, 1916 (*ibid.*, p. 1311); and the Court of Appeal of Aix, October 6, 1916 (44 Clunet, p. 717). The Court of Appeal of Alger in the important case of the *Vulcan Coal Company* decided on July 22, 1915, declared that "according to a principle of the law of nations, belligerent states alone are enemies, not the citizens thereof; consequently, the nationals of each such state have free access to the courts of the enemy country." (Text in Clunet, T. 42, pp. 903 ff.)

As to decisions affirming the right to sue, see the article of M. Clunet, *Les Sujets Ennemis*, etc., Clunet's Journal, T. 43, pp. 1089 ff., and the article of Barthélemy, cited above, 43 Clunet, pp. 147 ff.

<sup>90</sup> *Campagnie Bulgaria v. Olivier*. Text in Phily. *Jurisprudence Speciale*, Pt. III, pp. 749 ff.; 43 Clunet, pp. 380 ff., and Troimaux, pp. 186 ff. See also 43 Clunet, p. 1001. A history of this interesting case may be found in Troimaux, *Séquestres et Séquestrés*, pp. 163 ff. The case involved the right of an enemy insurance company to appeal from the decision of a tribunal to the *Cour d'Appel*. The *Avocat Général*, M. Godefroy, made a strong argument in favor of the right of enemy aliens to plead in the French courts, on grounds of justice and French precedents. There could be no danger, he contended, in allowing enemy subjects to exercise this right, for if they obtained a judgment the execution of which would in any way prejudice the national defense the government had the right to suspend execution.

introduces new principles, must, said the court, be strictly interpreted and in the light of existing laws and general principles. It was, as clearly appeared from the report on which it was based, designed to prohibit only *commercial* relations with the enemy and was not intended to interdict so-called civil agreements or acts. A distinction was made by the court between the *enjoyment* and the *exercise* of a right; an enemy alien might therefore be permitted to have his rights determined judicially even when, for reasons of public policy, he might be temporarily refused the benefit of the judgment recovered.<sup>91</sup> There were no considerations of public order or national defense why the legal rights of enemy subjects should not be determined by the courts even if it were deemed expedient to suspend during the war the enforcement of them. This decision was undoubtedly in harmony with the spirit of modern law and liberal practice and it was strongly approved by jurists like Renauld, Weiss, Barthélemy and Clunet.<sup>92</sup> It was, however, the object of much criticism in and out of parliament<sup>93</sup> and a bill was promptly introduced in the Chamber of Deputies, the purpose of which was to overrule the decision. The bill passed the Chamber but it appears never to have received the approval of the Senate. The right of enemy subjects to sue therefore remained to be determined by the courts in each particular case as it arose. Some have followed one rule, some another.<sup>94</sup> As yet the Court of Cassation

<sup>91</sup> President Monier, of the Tribunal of the Seine, in his decision of May 18, 1916, referred to above, asserted that the distinction between the enjoyment and the exercise of a right and that the former might be preserved while the latter was suspended, was illogical. Such a distinction, he said, was not authorized but, on the contrary, was repudiated by the texts and rested on a confusion of ideas. Barthélemy and Clunet while supporting the right to sue nevertheless criticise the distinction (Clunet, T. 43, p. 1094).

<sup>92</sup> Clunet remarks that it was "irreproachable."

<sup>93</sup> See, for example, the criticism of Troimaux, *op. cit.*, pp. 171 ff., who pronounced it "detestable," contrary to French precedent and doctrine, in violation of the decree of September 27, and unjustified in view of German practice in respect to the right of French nationals to sue in German courts. See also Théry, *Recevabilité des Sujets Ennemis à Ester en Justice en France* (44 Clunet, pp. 480 ff.), who ridicules the proposition that the privilege of access to the courts is a "natural right."

<sup>94</sup> It appears that in some instances the courts hesitated to open their doors to enemy litigants for fear of exposing themselves to insults and attacks from the populace and the press. Others, embarrassed by the difficulty of reaching

has not passed on the question. It was unfortunate that the matter was never definitely settled by an Act of Parliament in the interest of certainty and uniformity of practice. It was a question of public policy which should have been dealt with by legislation and not left to the discretion of the courts with their conflicting opinions.

#### GERMAN, AUSTRIAN AND ITALIAN PRACTICE

*The German Ordinance of August 7, 1914.*—By an ordinance of the *Bundesrath* of August 7, 1914, issued in pursuance of authority granted by an act of the German parliament of August 4, the right of all persons who had their domicile (*wohnsitz*) abroad,<sup>95</sup> and all corporations (*juristische personen*) which had their seat in foreign countries to maintain actions in the German courts for the recovery of debts or either patrimonial claims (*Vermögensrechtlichen ansprüche*) occurring before July 31, 1914, was suspended until October 31, 1914. Actions instituted prior to the taking effect of the ordinance were likewise suspended until the latter date. The Chancellor was, however, authorized to make exceptions in individual cases to the rule thus laid down, but it is not probable that any exemptions were ever granted to enemy aliens. He was also authorized to extend the application of the provisions of the ordinance to branch establishments of enemy nationality—without regard to their domicile or situs.<sup>96</sup> The

a decision because of the vagueness of the decree of September 27, refrained from pronouncing judgments, this notwithstanding the fact that Article 4 of the code civil enacts that "the judge who refuses to decide a case under the pretext of silence, obscurity or insufficiency of the law shall be prosecuted for denial of justice." In still other cases the judges suspended decision pending the action of parliament.

<sup>95</sup> Presumably without distinction as to whether they were domiciled in neutral or enemy territory. But by an ordinance of June 25, 1915, persons domiciled in Switzerland, if not enemy subjects, were allowed to sue in the German courts. 43 *Clunet*, p. 1166.

<sup>96</sup> Text of the ordinance in *Die Kriegsnotgesetze für das Reich und Preussen*, Bd. I, S. 64; French translation of the text in Reulos, *Manuel des Séquestres*, p. 478. See also an analysis in the *London Solicitors Journal* of November 7, 1914.

By a German ordinance of December 2, 1916, enemy subjects, companies and associations domiciled in enemy country were prohibited from bringing suits in Belgian courts for the enforcement of pecuniary claims. *Int. Law Notes*, January, 1917, p. 15.

duration of the decree appears to have been extended from time to time, so that whereas it was ostensibly intended at first to be only a temporary measure it was in fact made permanent.

*Its Weight and Effect.*—It will be seen from an examination of the ordinance that the test of enemy character, so far as judicial capacity was concerned, was domicile rather than nationality. Under the terms of the ordinance enemy subjects domiciled or resident in the Empire were free to maintain actions in the German courts without restriction, both as plaintiffs and defendants, and apparently without regard to whether the litigant was interned in a concentration camp or not. The same liberty was accorded to the local branches of houses whose main establishments were situated in foreign countries. Even as to enemy subjects domiciled abroad the right to maintain actions in respect to property rights accruing after July 31, 1914, remained in effect. Likewise actions other than those for the recovery of debts and the enforcement of property rights, such as those relating to civil status, guardianship, etc., could be maintained by enemy subjects residing outside the Empire.<sup>97</sup> Finally, enemy subjects even when residing in enemy territory were allowed the right of defense in actions brought against them in the German courts.

In theory, therefore, apparently the only persons to whom the German courts were closed were those domiciled *outside* the Empire and establishments whose head offices were situated in foreign countries. Local branch houses were free to maintain actions, as were persons domiciled in the Empire. It would seem therefore that the impression which appears to have gained currency in France that Frenchmen residing in Germany had no *persona standi in judicio* was without foundation.<sup>98</sup> There is little available information now as to the

<sup>97</sup> Huberich remarks that non-residents were exposed to one practical difficulty in maintaining actions in the German courts, in that they were required to give security for costs and no appearance could be entered without a written power of attorney. Ignorance of this rule caused many defendants resident in England and who were cited by substitute service but who failed to appear, to be judged by default and execution levied on their property. Note in the *Jour. of the Soc. of Comp. Leg.*, January, 1915, p. 54.

<sup>98</sup> This was pointed out by Barthélemy and Clunet in the articles cited above. Compare also Huberich "German Emergency Legislation Affecting Commercial

manner in which the German ordinance was carried out, but French writers admit that instances are not lacking in which Frenchmen were allowed to maintain actions and appear as defendants.<sup>99</sup> Nevertheless, the practical difficulties encountered in exercising the privilege granted appear to have been insurmountable in many cases.<sup>100</sup>

The *Reichsgericht* rendered a decision on July 8, 1915, in which it upheld the right of English subjects domiciled in the Empire to sue in the German courts for the recovery of money due them on contracts, notwithstanding the English prohibition in respect to payments due German subjects.<sup>101</sup> German writers in fact assert that no restrictions were placed upon the right of enemy subjects domiciled in the Empire to bring actions in the courts, that no question was ever raised as to the right of German attorneys to take the cases of such persons and that there were no instances in which members of the German bar refused to defend enemy persons against whom suits were instituted.<sup>102</sup>

*Austrian Policy.*—The Austrian Government appears to have pursued a liberal policy. By an ordinance of October 7, 1915, enemy enterprises were allowed to bring actions with the consent of the

Matters," in *Law Notes* for June, 1915, p. 48, and the *Jour. of the Soc. of Comp. Leg.*, January, 1915, p. 55, which thus described German policy:

"Suffice it to say that the emergency provisions, taken as a whole, are creditable to Germany and its jurisprudence. They exhibit no spirit of vindictiveness. If there is retaliation, it is only resorted to where the rights conceded by Germany are refused by us. The disabilities and prohibitions, in a word, are no more than the reasonable safeguards which a belligerent may exact in the presence of that hideous anomaly—War."

<sup>99</sup> See Barthélemy in 43 *Clunet*, p. 1446, and *Clunet*, *ibid.*, T. 42, p. 567, and T. 43, p. 1131. See also an article by Dr. Arthur Curti, a Swiss jurist, entitled *De la Condition des Sujets Ennemis Selon la Législation et la Jurisprudence Allemandes*, 42 *Clunet*, pp. 785 ff.

<sup>100</sup> G. F. in an article entitled *Accès des Sujets Ennemis aux Tribunaux Allemands*, in 44 *Clunet*, pp. 48 ff., calls attention to various other difficulties which made recourse to the German courts by enemy subjects, either as plaintiffs or defendants, even where the right was accorded by law, a practical impossibility.

<sup>101</sup> Soergel, *Kriegsrechtsprechung und Kriegsrechtlehre*, pp. 99, 111.

<sup>102</sup> See an article dealing with the right of enemy aliens to sue in German courts and to employ attorneys, by Dr. Haber, of Leipzig, in the *Juristische Wochenschrift* of April 15, 1916, reprinted in French in 44 *Clunet's Journal*, pp. 448 ff.



surveillant. In the case of *Attenbach v. Kornfeld*, a French haberdasher of Vienna, who returned to France at the outbreak of the war, was allowed to hire an attorney and bring an action against an Austrian for the recovery of a debt incurred before the war. The State was interested, said the court, in seeing that Austrian debtors performed the stipulations of their contracts with enemy houses. Judgment was decreed in favor of the Frenchman although the amount decreed was placed in the hands of the surveillant to be held by him until the end of the war.<sup>103</sup>

*Italian Policy.*—By a decree of June 24, 1915, the Italian Government prohibited the bringing of suits in the Courts of Italy by persons of Austrian or Hungarian nationality or persons resident in Austria or Hungary. All pending suits were suspended during the duration of the war and the statutes of limitation were likewise suspended. By a decree of July 18, 1916, the provisions of the above-mentioned decree were extended to all persons who were the subjects of any state at war with Italy, to all persons resident in such a state and to all persons who were subjects of or resident in the territory of the ally of an enemy.<sup>104</sup>

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<sup>103</sup> Communication by Professor Basdevant of Grenoble, in 44 *Clunet*, pp. 114 ff.

<sup>104</sup> Huberich, *Trading with the Enemy*, p. 12.

## PRIVATE PROPERTY ON THE HIGH SEAS

War, therefore, is an act of violence intended to compel our opponent to fulfil our will.

If our opponent is to be made to comply with our will, we must place him in a situation which is more oppressive to him than the sacrifice which we demand.

As long as the enemy is not defeated he may defeat me; then I shall be no longer my own master; he will dictate the law to me as I did to him.—Clausewitz on War.

### INTRODUCTION

The impulses of a people are, as a rule, the result of intuition rather than of reason, and at a very early period of the recent war the German people adopted as a national creed that they were at war with Anglo-Saxonism, with the Anglo-Saxon civilization as the opponent and enemy of German Kultur. They have made many mistakes, most of them the fruit of this self-same Kultur, but in this matter instinct, intuition, or impulse, whichever it may be, has proved a truer guide than the learning of their professors or the pronouncements of their statesmen. They are right. This was a war of two distinct and opposing civilizations, of two different mentalities—the mechanism of the Anglo-Saxon mind differs from the mechanism of the German mind, it differs indeed from the mechanism of the Continental mind.

For an Anglo-Saxon, in so far as he reasons at all, reasons inductively. He begins with a fact, whilst the Continental, as a rule, reasons deductively, that is, from a principle or a maxim.

The Anglo-Saxon loves a compromise, which is never logical, and distrusts logical conclusions. For his whole history has been a history of compromises between opposing claims advanced and supported by opposing factions.

If the major premise be admitted, the iniquities of the Inquisition were the truest mercy, and if we are to accept the test so often pro-

posed by Continental reasoners—"of two things one"—then it is possible to justify not merely the *auto da fé*, but every form of judicial torture and every extreme exercise of the Divine right either of Kings or Majorities.

It is the saving virtue due to a distrust of the obviously logical conclusion, and unshakable belief in the *via media*, and the possibility of compromise, that lie not merely at the root of all Anglo-Saxon legislation but inspire all Anglo-Saxon policy, and are the secret of its success.

There is nothing more illogical than the British Empire. It is neither British nor an Empire. No word can be found in the dictionary of any language which describes the ramshackle collection of governments and nationalities which, for want of a better phrase, we call the British Empire. It is a medley, illogical and unsymmetrical: but it works. It has worked with wonderful efficiency for four years, and in its working has staggered and upset the logic of all the learned men of all the learned bodies; and the policies of all the politicians who, arguing from the principles laid down by constitutional publicists, prophesied disruption at the sound of the first gun fired in anger.

This conflict of mentalities is not a new development, it has existed throughout all history. And in judging the record of our race in the matter of their interpretation and administration of the Laws of War at Sea we must not look for a logical appeal to principles, but for a compromise between opposing rights. It is this constant effort to find the *via media* between conflicting claims or rights that is the secret of the British Empire. The Anglo-Saxon recognizes that a right may be pushed so far as to become a wrong—and the failure to secure an acceptable compromise—which provoked the American Revolution, is the exception which proves the rule, that the British Empire—British legislation—and British policy are based on successful compromise. This system of compromise is the fruit of experience and of experiment, of mistakes fruitful of instruction, and successfully corrected because equitably remedied though solved illogically.

So much by way of introduction or caution. For it is not the purpose of this paper to expound a logical system of the Laws of War at

Sea. Nor is it proposed to enunciate any legal principle derived from the maxims of Continental Codes. All war is illogical. It is brutal, a brutal appeal to strength. It is an act of violence which though it may originate in the noblest motives can never be anything but cruel, and must inevitably inflict suffering on innocent persons.

But until some means can be devised for averting war it is necessary to recognize that wars must come, and to define and limit the rights that are created by a state of war. The best guide in this matter will be found in the teaching of history. For although nations have asserted as neutrals, rights which they have subsequently repudiated as belligerents, and *vice versa*, nevertheless, this very conflict of claims may be of service in finding the equitable compromise that we seek. In International Law as in Municipal Law and policy, experience is a safer guide than theory or maxims, or phrases masquerading as principles.

#### CAPTURE AT SEA

In the consideration of the question of Capture at Sea, we at once find ourselves in the presence of two claims which are frequently in conflict. Phillimore (Vol. III, p. 450) says, "All property belonging to the enemy found afloat upon the high seas and all property so afloat of subjects or neutrals conducting themselves as belligerents may be lawfully captured."

On the other hand the same author says, p. 238, Vol. III, "There is no more unquestionable proposition of International Law than the proposition that neutrals are entitled to carry on upon their own account a trade with a belligerent."

What is the justification for these claims?

It has been urged that the danger involved to private property tends to deter nations from war. But this thesis cannot be supported by any evidence derived from history, and it is only mentioned here to be put aside as untenable. Similarly the capture of enemy property as a means of enriching a belligerent is also put aside as no longer tenable. It may have been a motive influencing belligerents in times past. It may even be a motive influencing them today. It certainly influenced privateersmen. But it is not a motive that is

avowable or that can be adduced in support of the undoubted belligerent right."

The true and only justification of the right of capture is that all war is a struggle for life or death between nations, and that the sinews of war are provided by property. If a belligerent deprives his enemy of his property, he prevents him from fighting as effectively as he otherwise would, and so saves himself from being overcome, whilst he increases his own chances of overcoming his enemy. The seizure of enemy property is a weapon of war, and can only be justified as a weapon of war.

But when we come to neutral rights we find ourselves in presence of claims which conflict with belligerent rights, and it is here that we find a fruitful source of controversy. Grotius says, "*Verum est dictum . . . in hostium esse partibus qui ad bellum necessaria hosti administrat.*" No one disputes that if two persons or two nations are fighting, each combatant has the right to prevent his enemy from receiving arms or succor or support from third persons who call themselves neutral. The neutral right to trade is not disputed. But the controversy has constantly raged, and for the matter of that, still rages on the extent or limitation of the right to intercept or capture supplies sent in the exercise of this neutral right by private persons. It is not possible to do more than review very briefly the law and controversies on this subject, but it must always be remembered that the existence of the right of capture is not disputed. The controversies have always turned on two points: (1) The restriction or limitation of an admitted right or (2) The proposal to abolish that right altogether.

The oldest code of law still surviving is the *Consulat de la Mer* or *Consolato del Mare* which dates from the fourteenth century. Like most successful laws it was a codification of customs or practices which had grown up by common consent and not a system deduced from legal maxims for principles. The following are the rules of the *Consolato del Mare*:

1. Enemy goods on the ship of a friend are good prize.
2. In such a case the captain of the neutral ship should be paid freight for his cargo so confiscated, as if he had taken it to its primitive destination.

3. The property of a friend on an enemy vessel is free.

4. That the captors who have seized an enemy vessel and brought it into one of their ports should be paid freight on the neutral merchandise as if it had been carried to its primitive destination.

The above rules were framed when the motive of plunder was more prominent in respect to enemy property than it is today. There is a clear distinction between neutral and belligerent property, but the principle running through the rules is that a belligerent may confiscate his enemy's property, but must respect neutral property and neutral rights.

The aspect of trade or commerce as a means of succor and support of an enemy is not apparent as a governing motive, and indeed the war material of the fourteenth century was so restricted that the question of contraband in the modern sense must have been a minor matter. All men were armed or possessed arms of some sort, and the arms were such as could be carried on the person. The *Consolato del Mare* was the code of Europe up to the sixteenth century.

By ordinances of 1543 and 1584 the French Government declared that the property of a friend in an enemy's ship, and also the ship of a friend having the property of an enemy on board were lawful prize. It is doubtful if these ordinances were ever acted on. Sir Leoline Jenkins thought not: but in the seventeenth century divergence from the code of the *Consolato del Mare* became common. By the Treaty of Westminster of 1654 money and provisions as well as war material were declared contraband by agreement between England and Holland.

In 1681 the famous *ordonnance de la marine*, drawn up by Colbert in the name of Louis XIV of France was published. Article VII of that *ordonnance*, *Titre des Prises*, reads as follows:

Tous navires qui se trouveront chargés d'effets appartenans à nos ennemis, et les marchandises de nos sujets ou alliés qui se trouveront dans un navire ennemi, seront pareillement de bonne prise.

On this the commentator makes the remarks:

D'effets appartenans à nos ennemis. La même chose étoit défendue chez les romains. L Mercatores au cod de commerciis et mercatoribus.

Dans un Navire ennemi, car il n'est pas permis de fréter un vaisseau ennemi et les marchandises et effets quoi qu' appartenans aux Sujets du Roi ou à ses allies, ne seroient pas moins de bonne prise que le navire ennemi; cet Art. a été confirmé par un arrêt du conseil du 26 Octobre 1692, et par un autre du 23 Juillet 1704.

The ordonnance of 1704 decreed:

S'il se trouve sur les vaisseaux neutres des effets appartenans aux ennemis de Sa Majesté les vaisseaux et tout le chargement seront de bonne prise.

Here was a gross violation of neutral rights. A flagrant departure from the public law of Europe and from the custom and practice of centuries. That it could be supported by some forgotten rule of Roman Law or by the maxim "*que la robe ennemi confisque la marchandise et la vaisseau ami*" was no justification for a departure from accepted International Law. But the late sixteenth and early part of the seventeenth centuries were the period of the expansion of commerce. The treaties begin to bristle with commercial stipulations and nations were becoming more and more interdependent. Whilst we may allow full weight to the sordid motives of the privateersmen there was certainly another factor governing the Law of Capture at Sea. The war of exhaustion had become an international weapon. Commerce sustained the strength of a nation, the deprivation of commerce weakened and exhausted a nation.

In the War of the Spanish Succession the exhaustion of France was the governing influence that induced Louis XIV to sign what to him must have been the humiliating Treaty of Utrecht. England was not exhausted, and owed her vigorous vitality to sea power. Yet the 17th Article of the Commercial Treaty of Utrecht between England and France stipulated for free ships, free goods except contraband of war and was a distinct repudiation of the French Law. This article was a British article. Why? Because the Power that has the mastery of the sea has no need for *la guerre des courses*, or for privateering. Moreover, the British maritime supremacy was not limited to vessels of war, but included a growing mercantile marine. Privateering is always the resource of the weaker naval power. But the weapon of an effective or virtual blockade, amounting to an interruption or

prohibition of commerce, is a serious military weapon. The exploits of the Alabama and her consorts in no way influenced the Civil War in America, but the blockade of the southern coasts exhausted the Confederacy. It was as much a factor in the decision of the war as the victories of General Grant.

This is the prominent fact that has influenced the history of Europe from the date of the battle of La Hogue in 1692 to the present day. Sea power is telling every day, and the exploits of the submarine could not and did not, as the Germans expected, decide the war.

The 17th Article of the Commercial Treaty of Utrecht was an attempt to readjust the balance between neutral rights and belligerent claims. It was a departure from the principles of the Roman Law and the clear cut distinctions of the *Consolato del Mare*; but it was a special contract with France and was not of universal application. It was not the law, but was an exception to the law.

The French Regulation of October 21, 1744, is too long for quotation, but it gave neutral vessels sailing from their own ports the right to carry the goods of their own country to an enemy port, except contraband of war. It also gave neutral ships the right to sail from an enemy port with goods loaded on account of neutral sovereigns for a port of their own sovereign. But otherwise enemy goods on neutral ships were good prize.

On January 18, 1753, the law officers of the British Crown submitted a memorandum of the law in the matter of prize. This memorandum is an annexure to the well-known despatch of the Duke of Newcastle in the matter of the Silesian loan, and is too long for quotation in full. But the following extract gives the pith of the statement:

First as to the Law.

When two Powers are at war, they have a right to make prizes of the ships, goods, and effects of each other upon the High Seas. Whatever is the property of the Enemy may be acquired by capture at sea; but the Property of a Friend cannot be taken provided he observes neutrality. Hence the Law of Nations has established:

That the goods of an Enemy on board the ship of a Friend may be taken.



That the lawful goods of a Friend on Board the ship of an Enemy ought to be restored.

That contraband goods going to the enemy tho' the Property of a Friend may be taken as Prize; because supplying the enemy with what enables him better to carry on the War is a departure from Neutrality.

This is substantially the *Consolato del Mare* plus the confiscation of contraband. The law officers were not legislating, they were stating the law, and the law had come to recognize a new factor in war, and a new distinction in the right of a belligerent. The right of plunder, of confiscating enemy property was still present in the law. But a new and competitive motive or justification for belligerent rights appeared.

The law of capture at sea was gradually taking the direction that the right of the belligerent was to intercept succors or aids sent to his enemy, a much nobler and more justifiable right than the right to plunder. The two rights stand concurrently in the law, but it is evident that as between belligerents the path of progress, if motive is to weigh, lies in the replacement of the right to plunder by the right to intercept or control succor. Provided always that full consideration is given to the rights of neutrals.

On February 1, 1793, the French Convention declared war on England, and the British Government at once entered into a series of treaties prohibiting the export to France of naval and military stores or provisions. The signatories to those treaties included Russia, Spain, Naples, Prussia, Austria and Portugal. In fact all Europe except Sweden and Denmark. Here we find the right of control of commerce, as distinct from the right of plunder of commerce, coming into prominence.

#### PREEMPTION

And this new right or claim was emphasized when both France and England preempted the cargoes of ships laden with corn, flour or meat.

England's action gave ground for controversy. For although the Treaty of 1691 between England and Sweden made money, provisions, and horses, with furniture necessary for horses, contraband, Sweden,

Denmark and the United States protested. The British Government held that by modern law provisions are contraband whenever the depriving of an enemy of these supplies is one of the means of reducing him to terms. Here, in this argument, we are getting on more legitimate ground than the old motive of plunder. We are leaving the claim to use war as legalized brigandage and taking our stand on the right of a belligerent to prevent aid or succor in any shape from reaching his enemy—a much more respectable position, to say the least of it. The argument in the case of England was supported by the fact that the French Government had armed almost the whole French nation—and had established a virtual monopoly of the corn trade, but this was merely an extension of the principle laid down by the British Court of Admiralty, and in so far as it was a valid justification, its effect was to limit the use of the weapon of interception, or control of commerce, to nations where conscription or government control of food was in force.

On the British side it could be contended that it was not an invidious rule, but the revival of a practice recognized in many treaties of the seventeenth century. But, as we have seen, the United States objected. Jefferson wrote: "Such a stoppage to an unblockaded port would be so unequivocal an infringement of neutral rights, that we cannot conceive it will be attempted." As the law stood Jefferson had a strong case. For in the absence of express treaty stipulations the law, as stated by the law officers in 1753, was good law and we may put aside for the moment the argument derived from the general mobilization of the French nation, for as we have seen this is a limiting argument, and look frankly at the conflict of claims.

There are no two nations which have a greater respect for the rights of property and the liberty of the subject than America and Great Britain. But there are also no more practical nations than those which form the two great branches of the Anglo-Saxon race, and they are quick to recognize that conditions may change in such a manner that the logical exercise of a right is out of date, and that rights which grew up under different conditions, call for a new interpretation suited to the changes brought about by human progress. Slavery was once a legal right in America—it has ceased to be so. The protection

of property and the liberty of the individual are guaranteed by the 5th amendment to the American Constitution, but the American Statute Book contains laws intended to limit such rights—in such a manner that the right of one party shall not be another's wrong. Here then we were in presence of two conflicting claims. On the one side we had a claim to use sea power not for purposes of plunder—but as a weapon of war for the purpose of bringing the enemy to terms. Sea power was to be used to intercept supplies and control commerce—but not to plunder commerce. On the other side was an appeal to a legal right which had been long established.

The matter was very properly referred to negotiation and compromise, and the negotiations resulted in the famous Jay Treaty of 1794. The 18th Article of that treaty reads as follows:

In order to regulate what is in future to be deemed contraband of war, it is agreed that under the said denomination shall be comprised all arms and implements serving for the purposes of war, by land or by sea, such as cannon, muskets, mortars, petards, bombs, grenades, carcasses, saucisses, carriages for cannon, musket rests, bandoliers, gunpowder, match, saltpetre, ball, pikes, swords, head pieces, cuirasses, halberts, lances, javelins, horse furniture, holsters, belts, and generally all other implements of war, as also timber for ship building, tar or rozin, copper in sheets, sails, hemp and cordage, and generally whatever may serve directly to the equipment of vessels, unwrought iron and fir planks only excepted; and all the above articles are hereby declared to be just objects of confiscation, whenever they are attempted to be carried to an enemy.

And whereas the difficulty of agreeing on the precise cases in which alone provisions and other articles not generally contraband may be regarded as such, renders it expedient to provide against the inconveniences and misunderstandings which might thence arise: It is further agreed that whenever any such articles so becoming contraband, according to the existing laws of nations, shall for that reason be seized, the same shall not be confiscated, but the owners thereof shall be speedily and completely indemnified; and the captors, or, in their default, the Government under whose authority they act, shall pay to the masters or owners of such vessel the full value of all such articles, with a reasonable mercantile profit thereon, together with the freight, and also the demurrage incident to such detention.

This treaty was concluded by George Washington, John Jay, William Pitt, and Lord Grenville.

In 1803 a treaty was concluded between Great Britain and Sweden. The following is the Second Article of that Treaty:

Les croiseurs de la Puissance belligérante exerceront le droit de detenir les batimens de la Puissance neutre allant aux ports de l'ennemi avec des chargemens de provisions ou de poix, résine, goudron, chanvre, et généralement tous les articles non manufacturés, servant à l'équipement des bâtimens de toutes dimensions, et également tous les articles manufacturés servant à l'équipement des bâtimens marchands (le hareng, fer en barres, acier, cuivre rouge, laiton, fil de laiton, planches, et madriers, hors ceux de chêne et esparres, pourtant exceptés); et si les chargemens, ainsi exportés par les bâtimens de la Puissance, ~~ne~~ sont du produit du territoire de cette Puissance, et allant pour compte de ses sujets, la Puissance belligérante exercera dans ce cas le droit d'achat sous la condition de payer un benefice de dix pour cent sur le prix de la facture de chargement fidèlement déclaré, ou du vrai taux du marché soit en Suede soit en Angleterre, au choix du propriétaire, et en outre une indemnité pour la détention et les dépenses nécessaires.

Here then we find the system of preemption defined, and legalized. Manning (Law of Nations), after referring to the older treaties of the seventeenth century, says:

In this country, although some of the treaties [*i.e.* seventeenth century treaties] above quoted show that our government formerly recognized the right of Pre-emption in its most comprehensive scope, yet such exercise of the right has, with us, long fallen into disuse. Pre-emption is confined in our practice to those instances where goods are of that description that their transport to our enemy would be manifestly to our disadvantage, while, on the other hand the law of Contraband does justify their confiscation. "Pre-emption," said Sir William Scott, "is no unfair compromise, as it should seem, between the belligerents' rights, and the claims of the neutral to export his native commodities, though immediately subservient to the purposes of hostility."

In the case of the *Haabet*,<sup>1</sup> Lord Stowell (Sir William Scott) said:

The right of taking possession of cargoes of this description, *Commeatus or Provisions*, going to the enemy's ports, is no peculiar claim of this country; it belongs generally to belligerent nations. The ancient practice of Europe, or at least of several maritime States of Europe, was to confiscate them entirely; a century has not elapsed since this claim has been asserted by some of them. A more mitigated

<sup>1</sup> *The Haabet* (No. 1), 2 C. Rob. 174; 1 Roscoe's Prize Cases, 212. See p. 214.

practice has prevailed in later times of holding such cargoes subject only to a right of pre-emption, that is, to a right of purchase upon a reasonable compensation, to the individual whose property is thus diverted.

The reasoning of Manning and of Lord Stowell seems unanswerable and is a confirmation of the wisdom and justice of the Jay Treaty and the Swedish Treaty.

But since the great Revolutionary and Napoleonic wars many things have happened. Conscription has become universal in Europe. Even in times of peace. For years Europe has been in presence of the "Nation in Arms": nor has the organization for war stopped at the military forces. The railways—the means of production and distribution of all commodities—have been so arranged as to pass under what is virtually government control immediately on the outbreak of war.

Contemporaneously with the changes in organization there have been changes in the material of war. Science has not been idle, and the best brains in Europe and America have been applied to utilizing all the resources of chemistry—or metallurgy—as well as all the forces of nature for the purposes of war. The list of articles that have a double use now includes almost every product either in a raw or manufactured state. It is almost impossible to say what is not or may not become conditional contraband. Raw cotton, india-rubber, motor-cars, steam yachts—all mineral or vegetable products may have a military use. In fact everything may be, and probably is, conditional contraband. *Sive instrumenta bellica sint, sive materia per se bello apta* (Bynkershoek). It was in the presence of this difficulty that the Foreign Office addressed the following instruction to Sir Edward Fry, the British representative at the Second Hague Conference. The paragraph is given in full.

With regard to contraband, many most difficult questions arose during the late war. These cases were sufficient to show that the rules with regard to contraband that were developed at the end of the eighteenth and the beginning of the nineteenth centuries are no longer satisfactory for the changed conditions under which commerce and war are now carried on. His Majesty's government recognize to the full the desirability of freeing neutral commerce to

the utmost extent possible from interference by belligerent Powers, and they are ready and willing for their part, in lieu of endeavoring to frame new and more satisfactory rules for the prevention of contraband trade in the future, to abandon the principle of contraband of war altogether, thus allowing the oversea trade in neutral vessels between belligerents on the one hand and neutrals on the other to continue during war without any restriction, subject only to its exclusion by blockade from an enemy's port. They are convinced that not only the interest of Great Britain, but the common interest of all nations will be found, on an unbiassed examination of the subject, to be served by the adoption of the course suggested.

Even Homer nods, and the British Foreign Office which on the whole deserves the gratitude of mankind for its constant efforts to limit the hardships and the horrors and injustice of war, showed less than its usual clear vision in this paragraph.

It was proposed to abolish contraband because practically everything had become contraband. A strange and insufficient reason.

It was proposed to substitute blockade with all the penalties incidental thereto, for the more merciful system approved in the Jay Treaty and by Lord Stowell, that is to say, it proposed to substitute the confiscation of commerce for the control of commerce.

And it was proposed to rely on blockade when blockade in the legal sense had become impossible or would shortly be rendered impossible by the submarine.

But there is some excuse for this defect of vision. The present writer happened about that date, *i.e.*, 1907, to discuss the naval position with a captain in the German Navy who has achieved distinction as an authority on naval subjects. To the remark that the submarine was a new weapon which would change naval war, the German captain replied:

I don't believe it. The submarine is dangerous to its crew, look at the accidents that have taken place—if anything goes wrong, and things must always go wrong sometimes, everyone is drowned or suffocated. No, I have no faith in submarines, what we want is more battleships and bigger battleships. For our present ships are too small. We want bigger guns and bigger ships if we are to face your Fleet.

It is right to add that at the outbreak of the present war the Germans actually possessed a smaller fleet of submarines than the British.

If then the German Admiralty which foresees everything and prepares everything did not foresee the potentialities of the submarine, or the barbarous use they intended to make of the new weapon, the British Foreign Office may be excused for not having been gifted with a greater foresight as to the influence of submarines on blockade.

Fortunately the British proposal was not accepted by the Conference.

#### THE FREEDOM OF THE SEAS

It will be convenient at this stage to consider another proposal which has been made; namely, the immunity of private property at sea, except contraband of war. For purely controversial purposes it might be sufficient to say that as everything is now contraband of war the proposal is inapplicable; but such a reply would be wanting both in courtesy and honesty. For the advocates of the proposal have certainly intended a great restriction of the list of contraband. The proposal has been made by four American Presidents and by writers such as Bluntschli, Pierantoni, De Martens, Bernard, Massé, de Lavelaye, Nys, Calvo, Maine, Hall, Woolsey, Field, Amos, etc. By English statesmen such as Brougham, Palmerston, Cobden, and Loreburn, as well as by Mill. It must therefore be examined as a proposal that comes before the world supported by the very highest authority.

The first criticism is that sea power always has been, is now, and always will be the power of the mercantile nation, as distinct from the military nation. It is possible that the trident may pass from the hands of England to the hands of America, many persons believe it will. Shipping and sea power go together, both require wealth to support them. But even so, it will only pass from the hands of one mercantile nation to the hands of another mercantile nation. To take the points from the trident is therefore to weaken the power of the mercantile nation in favor of the military nation. Is this desirable? The writer thinks not. The mercantile nation lives by peace and seeks peace. The military nation prepares for war, and regards war as a phase of policy—that is as a more active development of foreign policy than that pursued by the peaceful methods of diplomatists en-

gaged in the game of chicane or of intrigue or coercion of neighboring or rival states.

The matter was carefully considered by the British Government in 1907, and their view is expressed in the instructions addressed to Sir Edward Fry by Sir Edward Grey. The following is an extract from those instructions:

It is probable that a proposal will be brought before The Hague Conference to sanction the principle of the immunity of enemies' merchant ships and private property from capture at sea in time of war. His Majesty's Government have given careful consideration to this question, and the arguments on both sides have been fully set out in the various papers which have been at your disposal. They cannot disregard the weighty arguments which have been put forward in favor of immunity. Anything which restrains acts of war is in itself a step towards the abolition of all war, and by diminishing the apprehension of the evils which war would cause, removes one incentive to expenditure upon armaments. It is also possible to imagine cases in which the interests of Great Britain might benefit by the adoption of this principle of immunity from capture.

The British Navy is the only offensive weapon which Great Britain has against Continental Powers.

For her ability to bring pressure to bear upon her enemies in war Great Britain has therefore to rely on her Navy alone. His Majesty's Government cannot therefore authorize you to agree to any Resolution which would diminish the effective means which the Navy has of bringing pressure to bear upon an enemy.

In the recent war England and America, the two mercantile, and nonmilitary nations, had large armies fighting on the Continent of Europe: but those armies had been transported and existed in virtue of sea power. The German armies opposed to them felt the pressure of sea power. The difficulties of the German soldier in regard to ammunition, transport and food, were the creation of sea power. If there was a shortage of copper for cartridges, of glycerine and cotton for explosives, of materials for poisonous gas, the shortage was caused by sea power.

Facts are stubborn things, and the facts of the recent war justify those men who clung to the belief in sea power as a weapon of war and believed that the same conditions that created that power would



prevent its misuse. The illustrious men who have from time to time advocated the immunity of private property at sea carry weight—deservedly so: but their lives were devoted to the study of the principles of law and politics rather than to the hard facts of war. It is right therefore to cite the opinion of a student of war, and no name stands higher in that branch of historical research and military and economic science than that of the late Admiral Mahan. In his *Essay on the Possibilities of an Anglo-American Reunion* he wrote as follows:

In the same way it may be asserted quite confidently that the concession of immunity to what is unthinkingly called the private property of an enemy on the sea will never be conceded by a nation or alliance confident in its own sea power. It has been the dream of the weaker sea belligerents in all ages; and their arguments for it, at the first glance plausible, are very proper to urge from their point of view. That arch robber, the first Napoleon, who so remorselessly and exhaustively carried the principle of war sustaining war to its utmost logical sequence, and even in peace scrupled not to quarter his armies on subject countries, maintaining them on what after all was private property of foreigners, even he waxes quite eloquent and superficially most convincing as he compares the seizure of goods at sea, so fatal to his Empire, to the seizure of a wagon travelling on a country road.

Now private property borne upon the seas is engaged in promoting, in the most vital manner, the strength and resources of the nation by which it is handled. When that nation becomes belligerent the private property, so called, borne upon the seas is sustaining the well-being and endurance of the nation at war and consequently is injuring the opponent to an extent exceeding all other sources of national power.

Blockade, such as that enforced by the United States Navy during the Civil War, is evidently only a special phase of commerce destroying; yet how immense—nay decisive—its results!

It is only when effort is frittered away in the feeble dissemination of the *guerre de course* instead of being concentrated in a great combination to control the sea that commerce destroying justly incurs the reproach of misdirected effort.

How do these words, written in 1894, read today? Napoleon no longer lives—but does the Power that clamors for the freedom of the

seas respect private property on land? Is the control of commerce by the use of sea power an effective weapon, or is it not? Is the *guerre de course* any more worthy of respect than it was when Admiral Mahan correctly characterized it?

We see, therefore, that sea power is an effective weapon in war, and that whilst the old right of a belligerent to weaken and exhaust his enemy is as legitimate as ever, the manner of the exercise of that right calls for modification. Everything that man produces can be utilized by science for purposes of war, and even a baby's feeding bottle can be converted into a dangerous bomb. Everything therefore is now either contraband or conditional contraband. This creates an impossible condition for neutrals, and when facts or the changes caused by human progress render the old laws or the old rules intolerable, common sense calls for their amendment, but the Anglo-Saxon sense of justice calls also for a fair compromise between conflicting claims. It is impossible to define contraband when everything is contraband, but it is easy to distinguish between absolute contraband, that is to say, war material—and articles which have a double use. A fifteen inch howitzer is not an article used in a citizen's household, nor is a machine gun, and there is no difficulty in distinguishing articles which are of military use only: but it is the fact that everything else has both a military and a civil use. To confiscate all articles of conditional contraband would be an intolerable act of robbery and injustice to neutrals. But the right of a belligerent to intercept supplies and succors to his enemy remains. A fair compromise has been found in the past between these two conflicting rights by the system of pre-emption, or purchase. By the control of commerce, instead of the confiscation of commerce. There is no reason in justice why a belligerent should not intercept supplies going to his enemy provided he pays for them, if they are neutral property, and have a double use. War material always has been liable to confiscation, and there is no reason why it should not remain so liable.

But this rule has a logical consequence. If private property on board ship is exempt from confiscation the ship that carries that property must be exempt from destruction. The iniquitous destruction of peaceable merchant ships during the recent war has horrified and

disgusted humanity. It would be easy to show that it has no legal justification, but it would be a waste of words to do so. For in this matter, we are dealing with a question which transcends the logic or the rules of jurists. It affects all humanity, and whatever rules may be framed for the future guidance of belligerents it is certain that suffering humanity will see to it that the destruction of merchant ships must be prohibited, and the prohibition must be made effective without any exception of any kind whatsoever. A merchant ship taken as prize, must be brought into port and not destroyed.

But this rule would admittedly be to the advantage of the strongest naval power. So it is but just that some concession should be made to the weaker naval powers. During the eighteenth century the right of asylum, or the right to take prizes into neutral ports, was frequently stipulated in treaties not limited to America, but treaties made by European powers including England. The concession of the right of asylum might be and is recommended as a compensation for the limited, and exceptional right of destruction such as it exists in International Law today.

But the prohibition of the right to destroy involves the abandonment of the right to arm. In this, as in every war, it has been proved that if an orgie of barbarism is to be avoided it is all important that there shall be a clear distinction between combatants and noncombatants—and a noncombatant should not be armed. It is no doubt the legal right of a noncombatant merchant vessel to arm and to fight in self-defense. But if the noncombatant is to be immune and to enjoy the rights of a noncombatant she must be a noncombatant. From the moment that the law protects the immunity of noncombatants, the right to arm, and the right to resist visit and search cease to have justification. It is not always possible to define self-defense. If two men meet, each carrying pistols, each entitled to shoot, it is hard to say that the man who fires first does not act in self-defense. The frontier between offense and defense is an indeterminate frontier, and it is but just that if a merchant ship should be exempt from all danger she should cease to be a danger to the vessel exercising the right of visit and search.

Here, then, if we are to examine history and the experience of

today, lies the path of progress. Rightly regarded, the proposals now submitted are a continuation of the path trodden in the past. If adopted, they will lead the way to a modification of the hardships and horrors of war, and will serve that purpose until wars shall cease and the world attains the blessing of a rule of universal law and universal peace.

GRAHAM BOWER.

## EDITORIAL COMMENT

### PEACE CONFERENCE DELEGATES AT PARIS

UNITED STATES: President Woodrow Wilson, Honorable Robert Lansing, Secretary of State; Honorable Henry White, Honorable Edward M. House, General Tasker H. Bliss.

BRITISH EMPIRE: Right Honorable D. Lloyd George, M.P., Premier; Right Honorable A. J. Balfour, M.P., Secretary of State for Foreign Affairs; Right Honorable A. Bonar Law, M.P., Lord Privy Seal and Leader of House of Commons; Right Honorable G. N. Barnes, Minister without Portfolio; Right Honorable Sir W. F. Lloyd, K.C.M.G., Prime Minister of Newfoundland.

#### BRITISH EMPIRE. Dominions and Colonies:

CANADA: Right Honorable Sir G. E. Foster, G.C.M.G., Minister of Trade and Commerce; Honorable A. L. Sifton, Minister of Customs.

AUSTRALIA: Right Honorable W. M. Hughes, Prime Minister; Right Honorable Sir Joseph Cook, G.C.M.G., Minister for Navy.

SOUTH AFRICA: Right Honorable Louis Botha, Prime Minister; Lieutenant General Right Honorable J. C. Smuts.

• NEW ZEALAND: S. F. Massey, Prime Minister.

INDIA: His Highness Sir Ganga Singh, etc., Maharaja of Bikaner; Honorable Lord Sinha, Undersecretary of State, representing the Secretary of State for India.

FRANCE: M. G. Clemenceau, President of the Council, Minister of War; M. Pichon, Minister for Foreign Affairs; M. L. L. Klotz, Minister of Finance; M. Andre Tardieu, Commissioner General for French-American War Affairs; M. Jules Cambon, Ambassador of France.

ITALY: M. Orlando, Prime Minister; Baron Sonnino, Minister of Foreign Affairs; Marquis Salvago Raggi; M. Antonio Salandra, M. Salvatore Barzilai.

JAPAN: Marquis Kimmochi Saionji, former Prime Minister; Baron Nobuaki Makino, Member of Diplomatic Council; Vicomte Sutemi Chinda, Ambassador to Great Britain; Keisheiro Matsui, Ambassador to France; M. Ijuin, Ambassador to Italy.

BELGIUM: M. Hymans, Minister of Foreign Affairs; M. Van Den Huvel, Minister to Vatican; M. Vandervelde, Minister of Justice.

BRAZIL: M. Epitacio Pessoa, Senator, former Minister of Justice; M. Olyntho do Magalhães, Minister to France, former Minister of Foreign Affairs; M. Pandia Calogeras, Deputy, former Minister of Finance.

SERBIA: M. Pachitch, Prime Minister; M. Trumbitch, Minister of Foreign Affairs; M. Vesnitch, Minister to France.

CHINA: M. Lou Tseng Tsiang, Minister of Foreign Affairs; M. Chengting Thomas Wang.

GREECE: M. Eleftherios Venizelos, Prime Minister; M. Nicolas Politis, Minister of Foreign Affairs.

HEDJAZ: S. A. L. Emir Feisal, M. Rustem Haidar.

POLAND: M. Roman Dmowski, President of the Polish National Committee; name of other delegate not on record.

PORTUGAL: Dr. Egas Moniz, Deputy, Minister of Foreign Affairs; Dr. Arthur Vilella.

ROUMANIA: M. Jean J. C. Bratiano, Prime Minister and Minister of Foreign Affairs; M. Nicolas Misu, Minister to England.

SIAM: Prince Charoon, Minister to France; Phya Bidadh Kosha, Minister to Italy.

CZECHO-SLOVAKS: M. Charles Kramar, Prime Minister; M. Edouard Benes, Minister of Foreign Affairs.

BOLIVIA: M. Ismael Montes, Minister to France.

CUBA: M. Antonio Sanchez Bustamante (provisionally replaced by M. Rafael Martinez, Minister to France).

ECUADOR: M. Dorn de Alsua, Minister to France.

GUATEMALA: One delegate. Name not on record.

HAITI: One delegate. Name not on record.

HONDURAS: One delegate. Name not on record.

LIBERIA: One delegate. Name not on record.

NICARAGUA: One delegate. Name not on record.

PANAMA: M. Antonio Bureos, Minister of the Republic of Panama in Spain.

PERU: Don Francisco Garcia Calderon, Peruvian Minister to Belgium.

URUGUAY: M. Juan Carlos Blanco, Minister of Uruguay to Paris.

#### TWO TREATIES OF PARIS

As we watch with absorbing interest the last step of the war drama at Paris, our minds naturally turn to that other negotiation at Paris just over a century ago which, followed by the Congress of Vienna, likewise wound up an era. As to method or as to substance, has it anything to teach us now?

The Peace of Paris, signed May 30, 1814, consisted of treaties, nearly identical, between France under Louis XVIII and Great Britain, Prussia, Russia, Austria, Sweden and Spain.

The preamble, as given in English by Hertslet in his Map of Europe by Treaty, reads as follows:

Animated by an equal desire to terminate the long agitations of Europe, and the sufferings of mankind, by a permanent Peace, founded upon a just repartition of force between its States, and containing in its Stipulations the pledge of its durability; and His Britannic Majesty, together with his Allies, being unwilling to require of France, now that, replaced under the paternal Government of Her Kings, she offers the assurance of security and stability to Europe, the conditions and guarantees which they had with regret demanded from her former Government, have named Plenipotentiaries to discuss, settle and sign a Treaty of Peace and Amity.

Can we in the same generous way assume that the will-o'-the-wisp republics of Austria and Germany and Russia assure security and stability to Europe? I trow not. Nor did the Allies in 1814 altogether make good their profession of trust in France. For an additional and secret article provided that:

The disposal of the territories given up by His Most Christian Majesty, under the Third Article of the Public Treaty, and the relations from whence a system of real and permanent Balance of Power in Europe is to be derived, shall be

regulated at the Congress upon the principles determined upon by the Allied Powers *among themselves*, and according to the general principles contained in the following articles.

Thus the Allies proposed, but Talleyrand disposed. As one writer says: "But in fact at the Congress of Vienna, the adroit audacity of Talleyrand and the disagreement of the Allies between themselves secured for France a considerable amount of influence."

The Congress to which this peace of Paris was a curtain-raiser lasted nearly eight months, being disturbed by Napoleon's escape from Elba and the great adventure of the hundred days.

The Congress of Vienna was a meeting of dictators for arranging the affairs of Europe according to their arbitrary views, and in effect required the smaller powers to submit to their decrees, without a share in their deliberations.

If such a Congress attempts to be a really deliberative body it becomes a bear garden. Some small group must control it, and who has a better call than those who have borne the heat and burden of the day. The equality of States does not mean equality of influence.

Eight powers were represented at Vienna and one of them refused to sign. The settlement at Vienna was one dictated by autocracy and had no lasting value. "To perfect the arrangements which appear in the final act, a multitude of special compacts had to be made, some of which were annexed to that instrument and declared to be a part of it." In point of fact there were fifteen such. The treaty itself comprised one hundred and twenty-one articles. They ranged in importance from the creation of a German Confederation to the neutralization of Cracow. They opened the Rhine and the Scheldt to free navigation. At Paris most of the captured French colonies had been restored and the French ships in continental ports were apportioned.

The precedence of diplomatic agents was regulated. The language of the treaty was French but expressly declared not to be a precedent.

Territorial changes were based upon prior ownerships, not upon racialties or a people's wishes.

There is example, there is also warning, for us to-day in the settlements of Paris and Vienna.

A new German Confederation may be created. If it includes German-Austria, thus weakening relatively the power of Prussia, will that be a factor of strength or of weakness in the future?

Partitioned Poland, after its tragic history, may be once again a



powerful state with a sea coast, but will its political life be any more harmonious than its past gives reason to expect?

Unless Russia is reassembled, will not the development of her parts, her commercial future, be darkened?

We may rejoice in Italy's recovery of her Irredenta, yet deprecate her greed to absorb the Adriatic littoral.

There is plenty of room for mutual jealousies; is any Talleyrand in sight to play upon them?

The territorial adjustments at Vienna were based upon a return to the *status quo* of 1792 in the main, but "compensations" were demanded in addition. Russia also was determined upon the possession of Warsaw, while Prussia claimed Saxony, which had adhered to Napoleon. These demands split the solidarity of the four leading Powers. France came in with Austria and Great Britain, consequently to keep the other two in check, and worked for a return to arms which was avoided by yielding in part to Russia's and Prussia's insistence.

In this we see the tendency of a coalition which has won its war to fall apart. The cementing influence disappears and other earlier causes of friction revive. For the purification of national character, which, according to some, war brings about, does not abolish national selfishness.

The situation at Vienna was comparatively simple, however. An autocratic shuffling of the stakes and a redistribution on the line of least resistance satisfied the parties.

But to-day we have a more complicated set of problems and a more exacting and critical gallery, because it is a democratic body responsible to many peoples.

The territorial adjustments which are demanded are fairly revolutionary, setting up certain new states, shearing certain old ones, combining, effacing, protecting, repairing the crimes of past ages.

Moreover, the principles by which the powers profess to be guided are obscure and ill defined. Take one of the simplest cases, that of Alsace-Lorraine.

Mr. Wilson's reference to this in his fourteen pointed address said that the wrong of 1871 should be righted. He has also adhered to the principle of self-determination for small peoples. •

Well, then, are Alsace-Lorraine to go back to France as the result of a plebiscite if restored at all, or not? On this we may be sure Germany will be vociferous.

Or consider the respective claims of Italy and the new and greater Serbia to Illyria as far as Fiume. What settlement of this problem can be worked out which will not sow the seeds of future trouble?

How shall Constantinople and the Straits and Palestine be treated?

But besides the difficult territorial problems are others even more apt to cause difference, and of a nature which the diplomats at Vienna could not have conceived.

Punishment for war crimes; how shall they be tried and how shall they be punished, yet unless tried and punished, the laws of war are no better than a dead letter!

Reparation for illegal ship sinkings, particularly of neutral owners; how can this be obtained when there are not German ships and German money enough to give reparation?

What is freedom of the seas; and if it means a weakening of the naval arm can it and should it be demanded of that British fleet which has saved civilization from German domination?

A league to enforce peace; something which everybody wants but no one is quite sure how it is to be brought about.

The question of disarmament, the abolition of conscription in its old form, without which we shall see a return to the race for armaments and the impoverishment of all peoples. How is this reconcilable with our demand for a great navy as "big as anyone's," say the sponsors of the plan. And then there is the tremendous problem of finding amongst our enemies that responsibility and that sovereignty with which alone we can deal.

The catalogue is long enough to point my moral. When you have a number of intricate and controversial questions to discuss; when the debaters are many and governed by a variety of motives, from greed to altruism, from sense to sentimentality; when the peoples of the world, watching each move in the game, are governed by unbridled democracy as never before; how can you get results?

Only, as it seems to the writer, by limiting the topics; by postponing the most controversial ones; by strenuous efforts to do justice; by establishing control in a few hands, which shall be dictatorial; and by taking to heart the warning of Vienna.

THEODORE S. WOOLSEY.

## INTERNATIONAL EXECUTIVES

AN interesting example of the possibility of establishing, on a practical and workable basis, international executive committees with certain delegated powers conferred upon them by the participating governments, for the purpose of securing joint international control in special spheres of common interest, is furnished by the successful operation during the war of international executives for nitrate of soda, tin, hides and leather, and certain other raw materials, and some food supplies.

These Executives, as they were called, were international joint committees organized by agreements between the United States and the principal Allied Governments, each committee being vested with certain well-defined executive powers relating to the procurement and distribution of some one or more of the materials mentioned to the best advantage of all the participating countries.

In the case of each of these materials the estimated world's supply available for the use of the Allies was inadequate for their requirements, and it was therefore necessary to adopt some method of stimulating production and at the same time to avoid unduly increasing the prices by competitive and unregulated buying; and to determine by common consent the share of these materials to be apportioned to each of the Allied countries and arrange for its allocation in accordance with their agreed requirements; and also to arrange for supplying each country from the markets most conveniently located for procuring its requirements with reference to shipping facilities which constituted a limiting factor in making the world's production available.

The general plan upon which all of these Executives were formed was for the appropriate governmental agency in each country to enter into a special agreement with the others, establishing the particular Executive created thereby and stipulating that it should be composed of an agreed number of representatives of each participating country with authority to carry out the specified arrangements agreed upon, with the proviso that these arrangements must be modified and readjusted from time to time by such further agreements as might be necessary in order to serve the best interests of all concerned. These

special agreements further provided for and defined, subject to the aforesaid reservation as to modifications and readjustments, the specific powers and duties of the Executives thereby established.

Different problems and conditions presented themselves in each case, requiring corresponding differences in treatment. In the case of nitrate of soda, for example, except for the supplementary supply produced through fixation plants and other artificial processes, which had been established during the war in the Allied countries, the entire available world's supply came from a single source, which was the natural nitrate beds in Chile, a neutral country, and the entire output of these beds was necessary to meet the requirements of the Allies. In the case of nitrate of soda, therefore, the problem was to arrange for the procurement of the largest possible output of nitrate from Chile at the lowest prices consistent with the greatest possible production, and to determine, by joint agreement among the Allies, how this supply should be allocated to the best advantage of the Allied interests.

To meet this situation an inter-allied agreement establishing the nitrate of soda Executive provided that all nitrate for use in the participating countries should be purchased only when and as authorized, and at prices fixed by the Executive, and that all purchases so authorized should be made under the direction of a Director of Purchases appointed by the Executive, and also that all nitrate so purchased should be pooled both as to quantity and price for the common interest of the governments concerned, and that the amount to be imported to each country should be determined by the Executive in accordance with prearranged allocations as fixed by the terms of the agreement.

Different methods of procurement and purchasing were found to be necessary in the case of some of the other raw materials mentioned, where only a part of the annual output came from neutral countries and a considerable quantity of the available supply was produced within the United States or in territories under the jurisdiction of some of the Allied Governments. In some cases it was found advisable, instead of empowering a single director of purchases to act for all, to arrange for several directors of purchases in the different markets, all acting under the direction of the Executive and in conjunction with each other for the mutual advantage of the several governments concerned. Again, in some cases it was found advisable

to allot to each country separate markets exclusively for its own purchases as well as to allot to each country its proportionate share of purchases made in a common market. In such cases it was provided that if the allocation of markets resulted in disadvantage to any of the participating countries through inequality of prices in different markets, then the cost of purchases in the different markets might be equalized by the Executive by monthly readjustments, so that all participating countries would pay the same average price for their respective shares, and the Executive was also authorized to require that all purchases made for account of more than one of the participating countries in a common market should be pooled as to quantity and price. In every case, however, each of the participating countries reserved to itself the right to determine the purchasing agencies or importing houses through which its allocated share should be purchased, either in its own markets or in the markets of other countries.

Another function of the Executive, which was common to all of these arrangements, was the authority to collect information as to methods adopted in the participating countries for economy in the domestic distribution and use of the raw material dealt with, and with power, whenever it was considered desirable, to make recommendations to each of the participating countries with reference thereto, and each of the countries was required to keep the Executive fully informed of all supplies on hand, and of all its purchases from all sources for its own use.

The underlying condition, which was essential to the success of these arrangements and which entered into all of them, was the governmental control exercised during the war in each of the participating countries over imports and exports, because it was necessary to agree, with reference to the materials under the control of each Executive, that the respective governments would exercise such control over their respective nationals as would prevent them from buying these materials through any channels except those provided for under the direction of the respective Executives.

It is difficult to overestimate the importance of the results secured through the control exercised by these Executives in regulating the price and the consumption of these materials, and in stimulating their production when the available supply was normally inadequate to meet the requirements of the Allies, as well as in arranging the

allocation of these materials among the Allies in accordance with the best interests of all concerned.

It remains for the future to disclose whether the principle of international cooperation, applied during this war through the operations of international executives, will find its way into the economic conditions prevailing in time of peace.

CHANDLER P. ANDERSON.

SOME POINTS AS TO SHIPS IN ENEMIES' PORTS AS PRIZES

An opera is often judged by its overture. The British prize courts have adopted a like practice as to the Hague Conventions and various international agreements which have been considered by them.

Thus the Judicial Committee of the Privy Council (*The Germania*, 4 Lloyd's P. C., p. 268), observing that the preamble of the Sixth Hague Convention stated that the signatory Powers, "anxious to insure the security of international commerce against the surprises of war, and wishing, in accordance with modern practice, to protect, as far as possible, operations undertaken in good faith and in process of being carried out before the outbreak of hostilities, have resolved to conclude a Convention to this effect," holds:

These words clearly indicate that the purpose of the convention is the security of international commerce, and that the operations undertaken in good faith and in process of being carried out are operations of a commercial character.

Therefore, the right to days of grace, and other privileges and exemptions given by that convention, was denied to ships not *navire de commerce* and so to a very valuable racing yacht.

The prize court went further and held these privileges would be denied to merchant ships, except when engaged in operations of a commercial character.

Thus, the *Prinz Adalbert* and *Kronprinzessin Cecelie* (4 Lloyd's P. C., p. 360), German steamships, belonging to the Hamburg-American Line, having been advised that war had broken out between Germany and France, sought refuge from capture by French warships by taking refuge in a British port (Falmouth) and, on the outbreak of

the war between Great Britain and Germany a day later, were there seized and held as prizes. They claimed the right to depart freely, or within days of grace, under the above Hague Convention, or, if not, that they were subject to detention only and not to condemnation. The President of the Prize Court, Sir Samuel Evans, held the vessels not in port "in pursuance of any commercial undertaking at all. When the master took the vessel into port and kept her there his object was not to engage in commerce; he was not taking part in any commercial operation whatever; but was using the port for a totally different purpose, which I think was not contemplated when the Powers agreed on this provision of the Hague Convention." Accordingly, he condemned the ships as *droits* of Admiralty in favor of the Crown.

On appeal to the Judicial Committee of the Privy Council, however, their Lordships were of opinion that the effect of the preamble of the Sixth Hague Convention, and Articles 1 and 2 thereof, admitted of considerable doubt. Therefore, they refused to decide the question at that time, but indicated that an order for detention only and not condemnation was correct, reserving all rights until the views of Germany as to this Convention were ascertained. (4 Lloyd's P. C., p. 372.)

The Judicial Committee, moreover, dealt with the case of a certain German ship which had sought refuge at Port Saïd within the territory neutralized in connection with the Suez Canal, having arrived in ignorance of the state of war August 5, 1914. She was, on October 16, taken possession of by the Anglo-Egyptian Government and conducted more than three miles out to sea and delivered to the British Cruiser *Warrior*, which seized her as a prize. On hearing in the Egyptian Supreme Court, sitting in Prize at Alexandria, the ship was held properly seized as a prize and ordered detained until further orders. Later the court held that Article 2, Hague Convention No. 6 of 1907, applied, and ordered the ship detained during the war, with a declaration that she must be restored or her value paid to her owners at the conclusion of hostilities.

The case was that of the *Gutenfels*, and there were included with it those of the *Barenfels* and *Derfflinger*. The Crown appealed in the two first and the owner of the *Derfflinger* appealed, she having been condemned on the special ground that she was built for conversion into a war-ship.

The Judicial Committee of the Privy Council held that Egypt

was not a party to the Hague Convention, but their Lordships declined to decide whether or no the Convention applied to Egypt.

It may be suggested in passing that Egypt could not be a party to the Hague Convention, not being a sovereign nation but part and parcel of the Ottoman Empire, or if not, then of the British Empire. However, they assumed that the Convention did apply.

They held further that Port Saïd was a port enemy to Germany, having regard to the British occupation of Egypt; that on August 4, 1914, a British Order in Council recognized the validity of the Hague Convention aforesaid, conditional on Germany doing the same within a limited time. Germany did not do so and the order did not, therefore, become operative.

Their Lordships inclined to think, however, this did not apply to Egypt.

On August 5, 1914, the Egyptian Government issued a decision or decree like the above Order in Council in many respects, but allowing days of grace to enemy ships in her ports, coming under the terms of the Convention, to sunset, August 14, for ships not more than 5,000 tons gross. The *Gutenfels* was of greater tonnage, so this did not apply to her.

Their Lordships held the inaction of Germany prevented the Hague Convention as above from coming into operation as between Great Britain and Germany; that the ship had long outstayed any limited right of exemption to which she might be entitled from her passage through the Suez Canal, assuming that she had such right. They approved a modified order, as in the case of the *Chile*, for detention, leaving the ultimate rights between the parties to be determined after the war.

The same conclusion was reached as to the *Barenfels*.

As to the *Derfflinger*, it was held that her construction, designed for conversion into a war-ship, prevented the Hague Convention from applying (see Article 5); that her voyage through the canal was over and her journey rendered abortive by the war, and she had landed both cargo and crew; that when war broke out the vessel was in the port, not in the exercise of a right of passage, but by way of user of the port as a port of refuge; that under these circumstances the Canal Convention had ceased to be operative and she was not entitled to any protection.

They said it was also found she had communicated from the port



by wireless with the German war-ships the *Goeben* and the *Breslau*; that the order for her confiscation was right. (*Gutenfels, Barenfels, Derfflinger*, 4 Lloyd's P. C., 336.)

The line of decisions indicates the difficulty of the points of law which a master, seeking to save his ship from capture, must have to determine. Without reproach to the individual judges, they indicate, too, the strongly partisan character of Prize Jurisdiction where the claimant's rights are habitually adjudicated by an alien, very commonly, of course, an enemy Court, in which ingenuity in detaining or condemning is almost certain to be the predominant trait.

The professions of a wholly impartial and detached view on the part of the judges are habitual, but it would often be more consistent if they were omitted.

It would seem as if a vessel on a commercial voyage which, seeking to escape a violent storm, took refuge in a sheltered port, was in no way abandoning her commercial adventure, but wisely seeking to preserve it from injury or destruction. It is difficult to see why the same line of reasoning does not apply to a merchant ship threatened by the clouds of war while on a commercial voyage, which, in consequence, seeks the shelter of a neutral port.

CHARLES NOBLE GREGORY.

#### PAN-NATIONALISM

The League of Nations, or some form of pan-nationalistic idea, seems to be meeting with more favor in the second decade of the twentieth century than the idea of nationalism met in the corresponding period of the nineteenth century. There is, however, a striking similarity in the reception which these ideas have received in their respective periods.

The idea that nationality should be embodied in political unity was unpopular among many of the public men of the early nineteenth century. Even when the struggle involving liberalism, constitutionalism and the development of the doctrine of nationality was at its height, it was difficult for some of those in high position to conceive how such ideas could permanently endure. Some of these doubters maintained that placed as they were by divine providence on thrones and "beyond the passions which agitate society" they should "not abandon the

people whom they sought to govern to the sport of factions, to error and its consequences, which must involve the loss of "society," but in spite of this contention they have been forced to yield their places.

During the nineteenth century nation after nation found itself lacking in security when it relied upon itself and found the burdens of independent military preparation increasingly heavy, and far from light when shared through the creation of alliances. The Czar of Russia, realizing these conditions in 1898, proposed an international conference upon these and other matters. When this conference met at The Hague as the first Peace Conference in 1899, the idea of internationalism was particularly emphasized. At this time, too, there were many scoffers, and the cartoonists made merry with some of the plans. The idea of internationalism had, however, been developing through the unfolding of the concept of the family of nations which, though at first European, came to include the United States after its independence, then Turkey after 1856, and Japan from 1899. Japan recognized the significance of entering into this family, and the Emperor at this time said:

In view of the responsibilities that devolve upon us in giving effect to the new treaties, it is our will that our ministers of state, acting on our behalf, should instruct our officials of all classes to observe the utmost circumspection in the management of affairs, to the end that subjects and strangers alike may enjoy equal privileges and advantages and that, every source of dissatisfaction being avoided, relations of peace and amity with all nations may be strengthened and consolidated in perpetuity.

Japan thus came as a nation in full standing to the First Hague Conference in 1899, where in all twenty-six states were represented. At the Second Hague Conference in 1907 the number of states represented was forty-four. It was, however, clearly announced that these conferences were called with "the desire to arrive at that high ideal of international justice which is the constant aim of the whole civilized universe." The various conventions drawn up at these conferences were, nevertheless, for the most part, binding only upon states which ratified them and only a degree of internationalism was secured, but not regulations for "the whole civilized universe."

Suárez, in 1612 even, had realized the need of a more general basis for world security, and in looking about at the states of his day said: "None of these states is sufficient for itself; all have need of reciprocal support, association, and mutual relations to ameliorate their situa-

tions." The representatives of some states at the Peace Conference of 1919 seem to be holding the old ideas of balance of power, alliances, and other combinations, while others seem to appreciate the drift toward the recognition of a degree of world unity. Metternich in his day viewed the effort of peoples to obtain embodiment in national unities as "absurd in itself." So in these days some view "the paramount authority of the public will" as did Metternich, but Metternich, and Francis Joseph, who connected Metternich's day with the twentieth century, have both passed away. As nationalism was not sacrificed, but, rather when separated from provincialism, given a greater opportunity for self-realization through the development of internationalism, so nationalism and internationalism, as is clearly shown in the demand for self-determination of peoples and for effective sanction for international rights, will not be sacrificed in the development of pan-nationalism, but will be offered an opportunity for development to a degree hitherto unknown.

G. G. W.

#### THE RECOGNITION OF THE CZECHO-SLOVAKS AS BELLIGERENTS

In September, 1918, the Secretary of State announced that, as the Czecho-Slovak peoples had taken up arms against the German and Austro-Hungarian Empires, and had placed organized armies in the field, which were waging war against those empires, under officers of their own nationality and in accordance with the rules and practices of civilized nations; and that as the Czecho-Slovaks had, in the prosecution of their independent purposes in the existing war, confided supreme political authority to the Czecho-Slovak National Council,

The Government of the United States recognizes that a state of belligerency exists between the Czecho-Slovaks thus organized and the German and Austro-Hungarian Empires.

It also recognizes the Czecho-Slovak National Council as a *de facto* belligerent government, clothed with proper authority to direct the military and political affairs of the Czecho-Slovaks.

It was also announced simultaneously that the Government of the United States was prepared to enter formally into relations with the *de facto* government thus recognized for the purpose of prosecuting

the war against the common enemy, the Empires of Germany and Austria-Hungary.

The tests which are commonly laid down respecting the propriety of the recognition of the belligerency of insurgents by a foreign power are designed to indicate the circumstances when such action may be taken without justifying complaint by the parent state engaged in the task of repression. The absence of ground for such complaint permits on principle the maintenance of friendly relations between that state and the power according recognition. The act of recognition serves, moreover, to release the former from responsibility for whatever may be done by the insurgents.

The recognition accorded the Czecho-Slovaks rested upon a different basis. The United States was at war with Austria-Hungary as well as Germany, and possessed the right as a belligerent to endeavor to cause the disintegration of either Empire as a means of weakening opposition and of hastening the day of victory. There was no duty to the enemy to refrain from such action. Hence it became unimportant whether, in recognizing the Czecho-Slovaks, those conditions were met which should have been satisfied had the United States been a neutral seeking to avoid participation in the conflict as the enemy of the Central European States.

That it was reasonable as well as expedient for the United States to accord recognition when it did, is not open to question. The justness of the claim of the Czecho-Slovak peoples to the control, disposition and government of the territories which they had long occupied was not lessened by their inability to maintain an army within their ancestral lands. Nor did that circumstance necessarily render arbitrary the determination of the United States and of the Allies to assist those peoples to realize their national aspirations through the recognition accorded. This mode of helping the Czecho-Slovak peoples in their struggle to bring into being a new State might have been open to criticism had their armies been disorganized bands waging a ruthless war regardless of the practices of civilized nations, or had they not confided their supreme political authority to an organized national council, or had their aspirations been deemed unsound in principle or incapable of exact geographical definition. In no one of these respects, however, were the Czecho-Slovaks wanting. It is believed that the United States acted wisely in pursuing the course which it did, and which was in harmony with the action taken by Great Britain in

August, 1918.. The text of the Declaration of Independence of the Czecho-Slovak nation, adopted at Paris October 18, 1918, gives promise of a new State whose ancient heritage of independence strengthens hope in the virility of its institutions, and whose profession of allegiance to principles of democracy gains increased respect through the announcement of a readiness to assume a proper portion of the Austro-Hungarian pre-war public debt.

CHARLES CHENEY HYDE.

#### PLEASURE AND RACING YACHTS IN PRIZE LAW

The prize courts in the present war have been called on to decide some novel points as to the status of private yachts, and to consider their rights in several particulars.

The Austro-Hungarian steam yacht *Oriental*, two hundred and eighty tons burden, owned by Dr. Desiderius de Bayer Kruesay, of Budapest, was at Southampton at the outbreak of war and was there detained. Two days later Austria-Hungary agreed to days of grace and the yacht was released. However, the days of grace expired and she was still at Southampton and was again seized.

It was found that she was flying from her stern post a Hungarian flag. There was no authorized flag of Hungary, but there was an Austro-Hungarian flag, and the flag in question was a part of this.

It was claimed she was a Swedish vessel registered with the Royal Swedish Sailing Association, with a Swedish crew and captain, and jointly owned by Dr. Kruesay and Dr. Banck, of Helsingborg, Sweden. She had gone to Cowes for the Regatta and was thus in British waters.

The President of the Prize Court, the Right Honorable Sir Samuel Evans, held that clearly, by the ship's papers and from the fact of her flying the Hungarian flag, her nationality must be held to be Hungarian; that the fact that the owner was admitted a member of a Swedish yacht club was absolutely immaterial; that the papers showed ownership in Dr. Kruesay alone, and by the settled rules of prize law, as well as by the Declaration of London, the test of nationality was the flag a vessel was entitled to fly.

The Crown contended that the provision of the Hague Convention, giving vessels in a hostile port at the outbreak of war days of grace, applied only to merchant vessels and not to pleasure yachts. This contention seems to have been allowed, and the days of grace to have been granted by the Crown notwithstanding. The yacht, for some reason, failed to avail herself of these days.

She was therefore held clearly enemy property, condemned, ordered sold, and the proceeds paid into court.

The President refused an application for admission of an appeal. (*The Oriental*, 1 Lloyd's [1915], P.C. 355.)

About six months later the same court was asked to condemn the celebrated German racing yacht *Germania*, one hundred and twenty-three tons (net), owned by Gustav Krupp von Bohlen, of the Imperial German Yacht Club. She was estimated worth £45,000, and came to Southampton to take part in the Cowes Regatta, with a German skipper and crew and also an English skipper and mate.

She was dry docked for repairs, but was seized August 4, 1914, in the wet dock at Southampton. An order merely for her detention during the war was at first made, but later her condemnation was claimed.

On behalf of her owner it was urged that, being in a British port when hostilities broke out, the order for detention should remain in force, that she had never been given days of grace to enable her to depart, and that, as a racing sailing yacht of no value for commercial, naval or military purposes, she was not confiscable, and confiscation would be contrary to the comity of nations and the Hague Conventions.

Austria-Hungary had given days of grace and therefore they were allowed to the Hungarian yacht above. Germany gave no days of grace.

The President held that a racing yacht, clearly, did not come within the Sixth Hague Convention, which dealt only with matters relating to commerce and was meant only to protect those engaged in commerce. He held this yacht not within the term *navire de commerce*. That not being protected by the Hague Convention, it must be condemned.

Repairs had been made before seizure and later to keep the yacht from deterioration, at the risk of repairers, and the court was prepared to decide against a claim interposed for them, but the Crown

consented to a reference and the Court was glad of this. (*The Germania*, 4 Lloyd's P. C. 237.)<sup>1</sup>

The London *Times* of January 18, 1918, states that the *Germania* only realized £10,000, and was bought by Mr. H. Hannevig, a Norwegian resident in London, and transferred to his brother, Mr. C. Hannevig, of New York. Ten thousand pounds was deposited with the marshal as a guarantee that during the war she would not be transferred to an enemy, and this sum was, through the marshal, presented by Mr. C. Hannevig to the British and French Red Cross Societies, a new guarantee being substituted. (4 Lloyd's P. C., p. 238, note.)

It appears that a Belgian yacht, the *Primavera*, was seized by the Germans when they entered Antwerp, and condemned in the Hamburg Prize Court. The Court said it was not established that the nations have firmly adopted the practice of excluding yachts from the right of capture at sea. (4 Lloyd's P. C., p. 265, note.)

Mr. Bateson, K.C., contended in the English Prize Court that the German Court placed the *Primavera* in the same category as merchant ships, but his contention was not successful in inducing like action in the English courts.

The cases seem to establish that the old classification of vessels as ships of state or merchant ships is not comprehensive. That yachts, either designed for pleasure cruising or for racing, and whether propelled by steam or sail, are a separate class, and not entitled to the special exemptions or privileges accorded to either of the other classes.

CHARLES NOBLE GREGORY.

AGREEMENT BETWEEN THE UNITED STATES AND GERMANY  
CONCERNING PRISONERS OF WAR<sup>2</sup>

On November 11, 1918, the American and German delegates at Berne signed an agreement concerning prisoners of war, sanitary, personnel and civil prisoners. As the armistice was signed on the same date, the provisions of this Prisoners' Agreement were superseded by the terms of the armistice, and therefore it is unlikely that

<sup>1</sup> The decision was affirmed by the Judicial Committee of the Privy Council March 29, 1917. 4 Lloyd's P. C., p. 266.

<sup>2</sup> Printed in Supplement to American Journal of International Law, January, 1919.

the Prisoners' Agreement will ever be ratified and put into force. The provisions of this agreement, however, are of interest as showing the extent to which it was considered necessary to establish, by a most definite and explicit agreement, the enforcement of humane treatment of prisoners of war.

The treatment of prisoners of war had been previously considered at the two Hague Conferences, and the agreement reached, which was substantially the same at both Conferences, was embodied in a section of the annex relating to the Laws and Custom of War on Land, attached to Hague Convention II, of 1899, and Hague Convention IV, of 1907.

Both of the Conventions above mentioned provided that their provisions and regulations did not apply except between contracting powers, and then only if all the belligerents were parties to the Convention. Inasmuch as Serbia had never ratified the 1907 Convention it has not been applied in this war. The 1899 Convention, however, had been ratified or adhered to by all the belligerents engaged in the conflict until the entrance of Liberia on August 4, 1917, and therefore the provisions and regulations of this Convention were technically in force until that date.

The general treatment provided for in 1899 Hague Convention II was that the prisoners of war "must be humanely treated;" that they "may be interned in a town fortress, camp or any other locality, and bound not to go beyond certain fixed limits, but they can only be confined as an indispensable measure of safety;" and their labor may be utilized according to their rank and aptitude, but "their tasks shall not be excessive, and shall have nothing to do with the military operations;" and that they "shall be subject to the laws, regulations and orders in force in the army of the State into whose hands they have fallen." This agreement also contains regulations governing the employment at labor and the payment therefor, parole, establishment of a bureau of information and its functions, pay to officers, religious freedom, wills, burial, repatriation, etc. It further provides that "failing a special agreement between the belligerents, prisoners of war shall be treated as regards food, quarters, and clothing, on the same footing as the troops of the government which has captured them."

It would seem that these requirements were precisely the terms which any civilized and self-respecting nation would impose upon



itself in the treatment of its prisoners without the obligation of any treaty stipulations.

Furthermore a special agreement on this subject had been made in Article XXIV of the Treaty of Amity and Commerce between the United States and Prussia, signed July 11, 1799, revived by Article XII of the Treaty of May 1, 1828, and subsequently accepted by the German Government as binding upon the empire. By this agreement the two contracting parties solemnly pledged themselves that, in case of hostilities between them, prisoners of war should not be subjected to destructive treatment but

they shall be placed . . . in wholesome situations; that they shall not be confined in dungeons, prison-ships, nor prisons, nor be put into irons, nor bound, nor otherwise restrained in the use of their limbs; that the officers shall be enlarged on their paroles within convenient districts and have comfortable quarters, and the common men be disposed in cantonments open and extensive enough for air and exercise, and lodged in barracks as roomy and good as are provided by the party in whose power they are for their own troops; that the officers shall also be daily furnished by the party in whose power they are with as many rations, and of the same articles and quality as are allowed by them, either in kind or by commutation, to officers of equal rank in their own army; and all others shall be daily furnished by them with such rations as they shall allow to a common soldier in their own service; . . . that each party shall be allowed to keep a commissary of prisoners of their own appointment, with every separate cantonment of prisoners in possession of the other, which commissary shall see that prisoners, as often as he pleases, shall be allowed to receive and distribute whatever comforts may be sent to them by their friends, and shall be free to make his reports in open letters to those who employ him. . . .

In view of the above-quoted provisions governing the treatment of American and German prisoners, and the standards supposed to have been reached by twentieth century civilization, it is significant that in this war it was considered imperative by the American Government to insist upon a new prisoners' agreement with Germany, which will be found to contain 184 articles, together with seven elaborate annexes.

From the provisions incorporated in this Prisoners' Agreement it would appear, that while in the year 1899 and also in the year 1907 the words "humane treatment" were regarded as having a universally accepted meaning, unnecessary of minute definition, in the year 1918, as a result of the treatment experienced by prisoners during this war, the American delegates deemed it advisable to set forth in the greatest detail the acts to be permitted and the acts to

be prohibited in complying with the regulation requiring "humane treatment" for prisoners.

Selecting at random from the provisions of this agreement it will be noted that the "humane treatment" of prisoners requires that they shall be protected "from acts of violence, ill-treatment, cruelties, personal insults and from public curiosity;" "against the inclemencies of the weather;" "against sickness, to the same extent as nationals of the captor state;" that they shall not be "treated as criminals;" that "prisoners of war shall be allowed to talk to each other;" that they "shall not be subjected to extreme heat or cold;" that such quantity and quality of wholesome food shall be provided "as is necessary to maintain unimpaired their normal physical health and working capacity;" that "dogs shall not be used as guards in the interior of prison camps, nor in guarding, working or exercising detachments unless they are in leash or are securely muzzled;" that they "shall be permitted to retain the clothing necessary for their personal use;" that they "shall neither be required to perform nor by menaces, threats or force coerced into volunteering to perform, any work directly related to the operations of the war;" that "all female personnel serving with the armed forces of either of the contracting parties shall, if captured, be given every possible protection against harsh treatment, insult or any manifestation of disrespect in any way related to their sex;" and many other provisions of a similar nature.

The Prisoners' Agreement also contains most explicit provisions governing the exercise of the duties undertaken by the neutral power designated to look after the interests of the captives by inspecting and reporting upon the conditions of their captivity; which work, as regards German prison camps, it will be remembered, was performed by American officials, prior to the breaking off of diplomatic relations between the United States and Germany.

Since, as a result of the conditions prevailing in some prisoners' camps during this war, it has been found necessary to enter into an agreement containing the provisions embodied in this agreement regulating the treatment of prisoners, it would seem desirable that an agreement along these lines should be included in the conventions growing out of the Peace Conference, in order that, as a matter of recognized and codified international law, prisoners of war should have the full protection against abuses which have not been pre-

vented even by the enlightened opinion of the twentieth century, as a safeguard in case a league of nations should not prove to be a complete and lasting barrier against future hostilities among nations.

CHANDLER P. ANDERSON.

#### INTERNATIONAL PARTICIPATION IN COURTS-MARTIAL

Certain of the French Courts have, during the war, invited Belgian advocates to appear before them. Recently, however, a Frenchman was permitted to appear in a court-martial in France upon a case conducted by American authorities. The matter related to several counts against a neutral civilian employee who was with the American Army. The French advocate appeared for the neutral alien.

The French advocate reports that he was received with every courtesy and was given every opportunity to defend his client before the court which particularly impressed him by its effort to reach a just decision regardless of all technicalities. In a French paper mentioning this case, significant mention is made of the desirability of more extended interchange of legal representatives before the French and American tribunals. The article closes:

"May the future—the immediate future—see this wish realized and as in all the great confederation of the allies may there be only one justice, one law and one united defense and sanction."

G. G. W.

## CHRONICLE OF INTERNATIONAL EVENTS

### WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives Diplomatiques, Paris; *B.*, boletín, bulletin, bolletino; *P. A. U.*, bulletin of the Pan American Union, Washington; *Cd.*, Great Britain, Parliamentary Papers; *Clunet*, J. de Dr. Int. Privé, Paris; *Current History*—Current History—A Monthly Magazine of the *New York Times*; *Doc. dipl.*, France, Documents diplomatiques; *B. Rel. Ext.*, Boletín de Relaciones Exteriores; *Dr.*, droit, diritto, derecho; *D. O.*, Diario Oficial; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *L.*, Law; *M.*, Magazine; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Belgium, Moniteur belge; *Martens*, Nouveau recueil général de traités, Leipzig; *Official Bulletin*, Official Bulletin of the United States; *Q.*, Quarterly; *Q. dip.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *R. pol. et parl.*, Revue Politique et Parlementaire; *Reichs G.*, Reichs-Gesetzblatt, Berlin; *Staats.*, Staatsblad, Netherlands; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, The Times (London).

*August, 1918.*

27 GERMANY—RUSSIA. Treaty relative to Baku, etc., signed. *Current History*, 9 (Pt. 1): 401.

*October, 1918.*

- 4 ARABS. Allied Governments formally recognize the belligerent status of Arab forces fighting with Allies against Turks in Palestine and Syria. *Current History*, 9 (Pt. 2): 354.
- 4 BULGARIA. Czar Ferdinand abdicated in favor of his son Boris. *Current History*, 9 (Pt. 2): 354.
- 5 RUSSIA. Abrogated the treaty of peace with Turkey. *Current History*, 9 (Pt. 2): 354.
- 5 AUSTRIA-HUNGARY. Appealed to President Wilson to conclude an armistice immediately, and to start negotiations for peace. *Current History*, 9 (Pt. 2): 354. *Official Bulletin*, No. 441, October 19, 1918.
- 6-8 GERMANY. Prince Maximilian of Baden sent note to President Wilson proposing a peace parley on President Wilson's

- principles and asking for an armistice. On October 8, the President replied, calling for evacuation of invaded territory before an armistice could be asked. *Current History*, 9 (Pt. 2): 354. Texts: *Official Bulletin*, No. 433, October 9, 1918.
- 8 TURKEY. Turkish emissaries sent to Allies from Smyrna to ask peace. *Current History*, 9 (Pt. 2): 354. Official text of request for armistice: *Official Bulletin*, No. 436, October 14, 1918.
- 11 AUSTRIA-HUNGARY. Emperor Charles issued manifesto announcing decision to unite Croatia, Slavonia, Bosnia, and Herzegovina in one state. *Current History*, 9 (Pt. 2): 354.
- 11 HUNGARY. Dr. Alexander Wekerle, Hungarian Prime Minister, resigned. *Current History*, 9 (Pt. 2): 354.
- 12 TURKEY. Note from Turkey making peace offer. *Official Bulletin*, No. 436, October 14, 1918.
- 12 GERMANY. Answered American note of October 8, agreeing to terms, but asking for a mixed commission on the evacuation of invaded territory. *Current History*, 9 (Pt. 2): 354. *Official Bulletin*, No. 437, October 15, 1918.
- 13 UNITED STATES—GERMANY. American reply to German note of October 12 declared there would be no armistice as long as German forces continued barbarities; that there would be no agreement with an autocratic government, and that the evacuation of invaded territory would be under the direction of the Allied military chiefs alone. *Current History*, 9 (Pt. 2): 354. *Official Bulletin*, No. 437, October 15, 1918.
- 16 GERMANY. Prussian Diet withdrew opposition to equal franchise and Federal Council accepted proposed amendment to the constitution restricting the right of the Emperor to declare war and make treaties. *Current History*, 9 (Pt. 2): 354.
- 16 POLAND. Great Britain recognized Polish National Army as autonomous, allied, and co-belligerent. *Current History*, 9 (Pt. 2): 354.
- 17 HUNGARY. Proclamation read in Hungarian Parliament declaring Hungary a separate state. *Current History*, 9 (Pt. 2): 354.
- 18 AUSTRIA. Proclamation made of organization of Austria on federated basis. *Current History*, 9 (Pt. 2): 354.
- 18 CZECHO-SLOVAK NATION. Proclaimed its independence; Czechs seized Prague. *Current History*, 9 (Pt. 2): 354. *Official Bulletin*, No. 441, October 19, 1918.

- 18 AUSTRIA. Baron Burian resigned as Austrian Premier. *Current History*, 9 (Pt. 2): 354.
- 18 UNITED STATES—AUSTRIA. American reply to Austrian note of October 19 refused request, stating that the independence of the Czecho-Slovaks and Jugo-Slav nations had been recognized by the United States, and with these nations would rest the decision as to any terms proposed by Austria. *Current History*, 9 (Pt. 2): 354. *Official Bulletin*, No. 441, October 19, 1918.
- 20 GERMANY—UNITED STATES. Third German note relative to peace text. *Current History*, 9 (Pt. 1): 368. *Official Bulletin*, No. 444, October 23, 1918.
- 22 GERMAN-AUSTRIAN STATE. German-Austrian deputies in the Austrian Parliament issued declaration announcing creation of German-Austrian State. On October 30, this German-Austrian National Council sent a note to the United States with notification of formation of the State. On November 12, it was proclaimed a part of the German Republic. *New York Times*, October 23, November 13, 1918.
- 23 GERMANY—UNITED STATES. American answer to third German peace note (Oct. 20), text. *Current History*, 9 (Pt. 1): 370. *Official Bulletin*, No. 445, October 24, 1918.
- 24 RUSSIA. Foreign Minister Tchitcherin sent note to President Wilson announcing readiness of Bolsheviki to conclude an armistice upon evacuation of occupied territory and asking when American troops would be withdrawn from Russia. *Current History*, 9 (Pt. 2): 560.
- 27 GERMANY—UNITED STATES. Fourth German peace note. Text: *Current History*, 9 (Pt. 1): 371. *Official Bulletin*, No. 449, October 29, 1918.
- 28 AUSTRIA-HUNGARY. Austrian note to Allies asking immediate negotiations without awaiting results of exchanges with Germany. Conceded all rights asked for Czecho-Slovaks and Jugo-Slavs, and asked for immediate cessation of hostilities. Text: *Current History*, 9 (Pt. 1): 560. *Official Bulletin*, No. 451, October 31, 1918.
- 29 AUSTRIA—UNITED STATES. Austrian note asking immediate armistice. Text: *Current History*, 9 (Pt. 1): 394. *Official Bulletin*, No. 451, October 31, 1918.

- 29 CZECHO-SLOVAK REPUBLIC. Czech National Council took over control of Prague on October 28. On October 29, the Republic was proclaimed. *New York Times*, October 30, 1918.
- 30 GERMANY. German note to United States telling of steps taken toward democratization of Germany. *Current History*, 9 (Pt. 1): 561. *Official Bulletin*, No. 445, October 24, 1918.
- 30 TURKEY. Armistice signed to go into effect at noon, local time, October 31. Text, with additional clause: *Current History*, 9 (Pt. 1): 399. *Official Bulletin*, No. 452, November 1, 1918 (no text).
- 30 AUSTRIA—ITALY. Italy informs Austria plea for armistice came too late. *New York Times*, October 30, 1918.
- 30 TURKEY. United States notifies Turkey that the request for armistice will be brought to the attention of nations at war with Turkey. *New York Times*, November 1, 1918. *Official Bulletin*, No. 452, November 1, 1918.
- 31 SUPREME WAR COUNCIL. Formal meetings began at Versailles. *New York Times*, November 1, 1918. *Official Bulletin*, No. 456, November 6, 1918.
- 31 SERBIA. The Kingdom of Greater Serbia proclaimed. Bosnia and Herzegovina incorporated themselves with the Kingdom. *New York Times*, November 1, 1918.
- 31 BOHEMIA. German-Bohemian Deputies proclaimed the independence of the State of German Bohemia and entered into negotiations with the Berlin Government with a view to joining German Austria to Germany. *New York Times*, November 1, 1918.

*November, 1918.*

- 1 AUSTRIA. General Diaz of Italian Army delivered armistice terms to Austria. *New York Times*, November 2, 1918.
- 1 AUSTRIA. Ex-Premier Tisza assassinated. *New York Times*, November 2, 1918.
- 1 GERMANY—AUSTRIA. Austria breaks off diplomatic relations with Berlin. *New York American*, November 2, 1918.
- 2 POLAND. The United States recognized the Polish Army as autonomous and co-belligerent. *New York Times*, November 5, 1918. *Official Bulletin*, No. 455, November 5, 1918.

- 2 BULGARIA. King Boris abdicated. A peasant government was established under the leadership of M. Stambuliwsky. *New York Times*, November 3, 1918.
- 3 AUSTRIA. Armistice signed with General Diaz, to go into effect at 3 o'clock, November 4. Text: *Current History*, 9 (Pt. 1): 396. *Official Bulletin*, No. 454, November 4, 1918.
- 3 JUGO-SLAV REPUBLIC. Formation announced. *New York Times*, November 4, 1918.
- 5 GERMANY—UNITED STATES. United States notifies Germany that Allies are willing to arrange armistice on President Wilson's principles, and that terms can be obtained from Marshal Foch. Text: *Official Bulletin*, No. 456, November 6, 1918.
- 5 GERMANY—UNITED STATES. Final American answer to fourth German peace note (October 27). Text: *Current History*, 9 (Pt. 1): 372. *Official Bulletin*, No. 456, November 6, 1918.
- 5 RUSSIA. Bolshevik Government handed neutral ministers a note for transmission to Entente nations asking for opening of peace negotiations. *Current History*, 9 (Pt. 2): 560.
- 6 RUSSIA—GERMANY. Germany demanded withdrawal of all Russian representatives in Germany. *Current History*, 9 (Pt. 2): 560.
- 6-8 GERMANY. German armistice delegation reached Allied lines on November 3, and Allied headquarters on November 8. *New York Times*, November 7, 1918. *Official Bulletin*, No. 459, November 9, 1918.
- 8 BAVARIA. Bavarian Diet passes decree deposing Wittelsbach dynasty. Bavarian Republic proclaimed. *New York Times*, November 9, 1918.
- 8 GERMANY. Prince Max of Baden resigned as Chancellor. Resignation not accepted. *New York Times*, November 9, 1918. Manifesto: *Official Bulletin*, No. 460, November 11, 1918.
- 9 GERMANY. The Kaiser abdicated. Prince Max of Baden was named Regent of the Empire; Friedrich Ebert was appointed Chancellor. Formal abdication of the Kaiser was dated November 28. *New York Times*, November 9, 1918. *Official Bulletin*, No. 460, November 11, 1918.
- 9 BRUNSWICK. The Duke of Brunswick and his successor abdicated. *New York Times*, November 10, 1918.



- 10 WÜRTTEMBERG. The King of Württemberg abdicated. *New York Times*, November 11, 1918.
  - 11 GERMANY. The Entente Allies and the United States. Armistice signed at 5 a.m., French time. Text: *Current History*, 9 (Pt. 1): 363. *Official Bulletin*, No. 460, November 11, 1918.
  - 11 MECKLENBURG-SCHWERIN. The Grand Duke abdicated. *New York Times*, November 12, 1918.
  - 11 OLDENBURG. The Grand Duke of Oldenburg was dethroned. *New York Times*, November 12, 1918.
  - 11 SAXONY. King Friedrich August abdicated. *New York Times*, November 12, 1918.
  - 11 or 13 AUSTRIA-HUNGARY. Emperor Charles abdicated as Emperor. Text: *Current History*, 9 (Pt. 1): 398.
  - 12 GERMANY. Revised text of armistice announced. Text: *Official Bulletin*, No. 462, November 12, 1918.
  - 12 ROUMANIA. The new Roumanian Government declared war on Germany. *New York Times*, November 13, 1918.
  - 13 GERMANY. Appealed to the United States for food. Texts of appeal and reply of United States: *Official Bulletin*, No. 462, November 13, 1918.
  - 13 ALSACE-LORRAINE. Members of the Second Chamber of Alsace-Lorraine constituted themselves into a National Council. *New York Times*, November 14, 1918.
  - 13 HESSE. Republic proclaimed. *New York Times*, November 14, 1918.
  - 13 WÜRTTEMBERG. Republic proclaimed. *New York Times*, November 14, 1918.
  - 13 LIPPE-DETMOLD. Prince Leopold abdicated. *New York Times*, November 14, 1918.
  - 13 SAXE-WEIMAR. Grand Duke William abdicated. *New York Times*, November 14, 1918.
  - 28 GERMANY. Formal abdication by William II of rights to the crown of Prussia and Germany. Text: *New York Times*, December 1, 1918. *Official Bulletin*, No. 460, November 11, 1918.
- December, 1918.
- 1 ROUMANIA. The National Roumanian Council of Transylvania proclaimed union with the Kingdom of Roumania. *New York Times*, December 8, 1918. Summary of proclamation: *New York Times*, December 11, 1918.

- 1 Former Crown Prince Wilhelm renounced his rights to the crown of Prussia and Germany. Text: *New York Times*, December 7, 1918.
- 4 President Wilson sailed for Europe; arrived at Brest December 13, 1918. *New York Times*, December 5, 1918. *Official Bulletin*, No. 479, December 4, 1918.
- 4 FRANCE. Certain trade treaties abrogated. *New York Times*, December 5, 1918.
- 4 PERU—CHILE. Bolivia offers her services to Peru in the dispute with Chile. *Washington Post*, December 5, 1918.
- 4 BULGARIA. Premier Malinoff resigned and was succeeded by M. Monchanoff. *New York Times*, December 5, 1918.
- 4 POLAND—GERMANY. Poland issued ultimatum to Germany demanding withdrawal of German troops. *New York Times*, December 5, 1918.
- 5 GERMANY. United States Army refuses to recognize authority of German Soviets over German officials. *Washington Post*, December 6, 1918.
- 6 GERMANY. Crown Prince renounced his right to throne. *New York Herald*, December 7, 1918.
- 6 GERMANY. The Crown Prince renounced his right to the German throne. Text: *New York Times*, December 7, 1918.
- 6 BADEN. Southern Baden announces desire to join Switzerland. *New York American*, December 7, 1918.
- 6 BADEN. Reported that Southern Baden is seeking to join Switzerland. *New York American*, December 7, 1918.
- 6 CHILE—GREAT BRITAIN. Chile suggests that Great Britain return Chilean ships requisitioned at beginning of war. *Washington Herald*, December 7, 1918.
- 6 BELGIUM. King of Belgium and French Premier agree Belgium's status must be changed. *New York Times*, December 7, 1918.
- 6 KOREA—JAPAN. Koreans appeal to the United States for help to effect a separation from Japan. *New York Times*, December 7, 1918.
- 7 SWEDEN—RUSSIA. Sweden recalls diplomatic and consular officers in Russia. *New York Times*, December 8, 1918. *Official Bulletin*, No. 487, December 13, 1918.

- 7 UNITED STATES—ARMENIA. The United States declines to recognize new Armenian Republic. *New York Times*, December 8, 1918.
- 7 UNITED STATES—PERU—CHILE. President Wilson tenders the mediation of the United States in the Tacna-Arica question. *El Diario Ilustrado* (Santiago), December 8, 9, 1918.
- 8 SWEDEN—RUSSIA. Sweden recalls her diplomatic and consular representatives in Russia. *New York Times*, December 9, 1918. *Official Bulletin*, No. 487, December 13, 1918.
- 8 SWEDEN—RUSSIA. Sweden recalls her diplomatic and consular representatives in Russia. *Washington Post*, December 9, 1918. *Official Bulletin*, No. 487, December 13, 1918.
- 9 ESTHONIA. German Government recognized the Republic of Esthonia. *Washington Post*, December 10, 1918.
- 9 SCHLESWIG-HOLSTEIN. Announcement that Schleswig-Holstein will be a republic. *New York Tribune*, December 10, 1918.
- 9 CENTRAL POWERS. Again ask the United States to intercede in their behalf. Are told to address such requests to all the Allies. *New York Times*, December 10, 1918. *Official Bulletin*, No. 484, December 10, 1918.
- 9 PERU—CHILE. Peru accepts the United States as mediator in the dispute with Chile. *New York Times*, December 10, 1918.
- 11 GERMANY. Dr. Solf, minister for foreign affairs, resigned. *New York Times*, December 17, 1918.
- 12 SWITZERLAND. Gustave Ador elected President of Swiss Republic. *New York Times*, December 12, 1918.
- 12 HESSE. The "People's Council for Republic of Hesse" replaced the Hessian Workman's, Peasants' and Soldiers' Council. *New York Herald*, December 12, 1918.
- 12 UNITED STATES. Asks Latin American countries to join in urging amicable settlement between Peru and Chile. *New York World*, December 13, 1918.
- 12 GERMANY. Dr. Solf, minister for foreign affairs, resigned. *New York Times*, December 13, 1918.
- 12 PEACE CONFERENCE. Announced that the Conference\* would begin January 3, 1919. *New York Tribune*, December 13, 1918.
- 12 PERU—CHILE. United States presented notes to Chile and Peru, pleading for peace in South America. *Washington Post*, December 13, 1918. *Official Bulletin*, No. 486, December 12, 1918.

- 12 NORWAY—RUSSIA. Norwegian Legation left Petrograd. *Washington Post*, December 13, 1918. *Official Bulletin*, No. 491, December 18, 1918.
- 13 NORWAY. Asks admission to Peace Conference discussion of League of Nations. *New York Times*, December 14, 1918.
- 13 German armistice extended to 5 a.m., January 17, 1919. *New York Times*, December 15, 1918. *Official Bulletin*, No. 488, December 14, 1918.
- 13 FRANCE. President Wilson lands at Brest. *New York Times*, December 14, 1918. *Official Bulletin*, No. 487, December 13, 1918.
- 13 NORWAY—RUSSIA. Norwegian Legation left Petrograd. *New York Times*, December 13, 1918. *Official Bulletin*, No. 491, December 18, 1918.
- 14 NORWAY. Asks a voice in framing a league of nations. *New York Herald*, December 15, 1918.
- 14 Armistice extended to January 17, 1919. *New York Times*, December 15, 1918. *Official Bulletin*, No. 488, December 18, 1918.
- 14 GERMANY. Swiss Legation asked for official information as to date and place of formal Peace Conference. *New York Times*, December 15, 1918. *Official Bulletin*, No. 488, December 14, 1918.
- 15 Marshal Foch refuses to recognize the Soldiers' and Workmen's Councils in Germany. *World*, December 16, 1918.
- 15 Summary of armistice extension. *World*, December 16, 1918.
- 15 BOHEMIA—MORAVIA—SILESIA. Austria asks self-determination for these nations. *Washington Post*, December 16, 1918.
- 15 PORTUGAL. President Sidonio Pais was assassinated. *New York Times*, December 16, 1918. *Official Bulletin*, No. 489, December 16, 1918.
- 15 MEXICO—UNITED STATES. American sailors kill one Mexican and wound another while rescuing a comrade in Tampico. *New York Times*, December 16, 1918. *Official Bulletin*, No. 489, December 16, 1918.
- 16 MONTENEGRO. Denies deposing its King. *New York American*, December 17, 1918. *Official Bulletin*, No. 490, December 17, 1918.
- 16 UKRANIA. The Hetman of Ukrania forced to abdicate. *New York Herald*, December 17, 1918.

- 16 POLAND—GERMANY. Poland severs relations with Germany. *New York Times*, December 17, 1918.
- 16 POLAND. Asks Allied recognition. *New York Times*, December 17, 1918.
- 21 LUXEMBURG—GERMANY. K. von Busch, German Minister to Luxemburg since March, 1914, expelled with his legation. *New York Times*, December 22, 1918.
- 22 CZECHO-SLOVAK REPUBLIC. Prof. T. A. Masaryk took oath of office as President at Prague. *New York Times*, December 23, 1918.
- 24 PORTUGAL. New Portuguese Ministry announced. *New York Times*, December 26, 1918.
- 27 GERMANY—POLAND. Poland issued ultimatum to Germany demanding right of passage of Polish troops over German-held railways to Vilna. *New York Times*, December 28.
- 29 GERMANY. Foreign Minister Haase resigned and is succeeded by Philip Scheidemann. *New York Times*, December 30, 1918.
- 30 GERMANY. Philip Scheidemann succeeded Hugo Haase as Minister of Foreign Affairs. Personnel of cabinet. *New York Times*, December 31, 1918.

KATHRYN SELLERS.

## PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

### GREAT BRITAIN<sup>1</sup>

Aliens' Restriction Order. Order in Council further amending the. Oct. 23, 1918. (St. R. & O. 1918, No. 1356.)

———. Order in Council further amending the. Nov. 25, 1918. (St. R. & O. 1918, No. 1549.)

Armistice. Conditions of an Armistice with Germany, signed Nov. 11, 1918 (Cd. 9212). 4d.

Austro-Hungarian Government. Note addressed Sept., 1918, by the Austro-Hungarian Government to the Governments of all the Belligerent States proposing conversations of a confidential and non-binding character respecting the fundamental principles for the conclusion of peace. Miscellaneous, No. 21. (1918.) (Cd. 9148.) 2d.

British Nationality and Status of Aliens. The Naturalization Regulations, Dec. 30, 1914, as amended Oct. 23, 1918. (St. R. & O. 1918, Nos. 1488, 1861.)

Currency and Foreign Exchange after the War. First Interim Report of Committee on. (Cd. 9182.) 3d.

Customs. Proclamation. Prohibition of Import. Sept. 27, 1918. (St. R. & O. 1918, No. 27; No. 1224.)

———. Proclamation. Prohibition of Import. Nov. 8, 1918. (St. R. & O. 1918, No. 28; No. 1462.)

Emigration. Correspondence as to the Emigration Bill. 1918. (Cd. 9173.) 2d.

German Colonies. Correspondence relating to the wishes of the Natives of the German Colonies as to their future government. (Cd. 9210.) 8d.

Hospital Ships. Circular despatch addressed to H. M. Diplomatic Representatives in Allied and Neutral Countries respecting the torpedoing by German submarines of the British Hospital Ships "Rewa,"

<sup>1</sup> Parliamentary and Official Publications of Great Britain may be obtained for the amount noted, from the Superintendent of Publications, H. M. Stationery Office, Imperial House, Kingsway, London, W. C. 2.

"Glenart Castle," "Guildford Castle" and "Llandovery Castle." Miscellaneous, No. 26 (1918). 4½d.

Imperial War Conference, 1918. Resolutions agreed to by the Conference; Extracts from Minutes of the Proceedings; and Papers laid before the Conference. (Cd. 9177.) 2s.6d.

Merchant Tonnage and the Submarine. Supplementary statement showing for the United Kingdom and for the world, for the period Aug., 1914, to Oct., 1918, merchant tonnage losses by enemy action and marine risk, merchant shipbuilding output, and enemy vessels captured and brought into service; with diagrams showing losses and output of merchant tonnage for the United Kingdom and for the world for each quarter up to Sept. 30, 1918. (Cd. 9221.) 3d.

Military Service. Order in Council, Sept. 27, 1918, under the Military Service Conventions with Allied States, Act 1917, signifying that a Convention, dated Aug. 8, 1918, has been made with Greece. (St. R. & O. No. 1225.)

Ministers. List of His Majesty's Ministers and Heads of Public Departments. Revised, Nov., 1918. 2½d.

Ministry of Shipping. Order, Oct. 18, 1918, made under sec. 11 (5) of the New Ministries and Secretaries Act, 1916, substituting the Shipping Controller for the Lords Commissioners of the Admiralty in the Agreements specific in the Schedule to this Order. (St. R. & O. 1918, No. 1421.)

Nitrate of Soda. Memorandum of Agreement between the Chilean Government and the Nitrate of Soda Executive for the sale and purchase of Nitrate of Soda. Miscellaneous, No. 22 (1918). (Cd. 9149.) 1½d.

Parcel Post. Foreign and Colonial Parcel Post Amendment (No. 85) warrant, Aug. 27, 1918. Costa Rica. (St. R. & O. No. 1239.)

———. Foreign and Colonial Parcel Post Amendment (No. 86) Warrant, Nov. 22, 1918. (St. R. & O. No. 1544.)

Prisoners of War. Agreement between the British and German Governments concerning Combatant Prisoners of War and Civilians. Miscellaneous, No. 20 (1918). (Cd. 9147.) 4½d.

———. Report on the Treatment by the Germans of Prisoners of War taken during the Spring Offensives of 1918. Miscellaneous, No. 19 (1918). (Cd. 9106.) 3d. Further report on same. Miscellaneous, No. 27 (1918). 3d.

———. Report on the Employment in Coal and Salt Mines of

the British Prisoners of War in Germany. Miscellaneous, No. 23 (1918). (Cd. 9150.) 2d.

Prisoners of War. Report on the Treatment by the Enemy of British Officers, Prisoners of War in Camps under the 10th (Hanover) Army Corps, up to March, 1918. Miscellaneous, No. 28 (1918). 3d.

———. Report on the Treatment of British Prisoners of War in Turkey. Miscellaneous, No. 24 (1918). (Cd. 9208.) 4½d.

Russia. Despatches from His Majesty's Consul General at Moscow, Aug. 5 to 9, 1918. Miscellaneous, No. 30 (1918). 2d.

Termination of the Present War. (Definition.) Bill to make provision for determining the date of the termination of the Present War, and for purposes connected therewith. (H. L. 1918, Nos. 144 and 144a.) Each 1½d. (H. C. 1918, No. 115.) 1½d.

Trade. Interim Report of Committee on Commercial and Industrial Policy regarding importation of goods from the present enemy countries after the war. (Cd. 9033.)

———. Interim report of Committee on Commercial and Industrial policy on the treatment of exports from the United Kingdom and British overseas possessions and the conservation of the resources of the Empire during transitional period after the war. (Cd. 9034.)

———. Final Report of Committee on Commercial and Industrial Policy on policy after the war. (Cd. 9035.)

Trading with the Enemy. (Statutory List.) Proclamation, together with the consolidated Statutory List of Persons and Firms in Countries, other than Enemy Countries, with whom persons and firms in the United Kingdom are prohibited from trading. With notes for British merchants engaged in foreign trade. Complete to Nov. 15, 1918. No. 68a. 8½d.

———. Enemy Banking Business Rules, Dec. 8, 1918, made under sec. 2 (4) of the Trading with the Enemy (amendment) Act, 1918. (St. R. & O. No. 1649.)

Treaty. Between Great Britain and Greece respecting the liability to military service of British subjects in Greece and Greek subjects in Great Britain. Miscellaneous, No. 16, 1918. (Cd. 9103.)

Treaty of Peace between Germany and Finland, together with Commercial and Shipping Agreements signed March 7, 1918. Miscellaneous, No. 29 (1918). 2d.

———. Between Central Powers and Ukrainian People's Re-



public, together with the supplementary treaty thereto, signed at Brest-Litovsk, February 9, 1918. Miscellaneous, No. 18 (1918). (Cd. 9105.) 2d.

UNITED STATES <sup>2</sup>

Alien Enemies. Proclamation abrogating, annulling, and rescinding certain regulations prescribing the conduct of alien enemies. December 23, 1918. 1 p. (No. 1506.) *State Dept.*

Alien Property. Executive order concerning certain sales to be conducted by Alien Property Custodian pursuant to trading with the enemy act and amendments thereof, relating to seats upon or membership in any stock, cotton, grain, produce or other exchange. Sept. 13, 1918. 1 p. (No. 2955.) *State Dept.*

Alien Property Custodian. Executive order vesting power and authority in a designated official (managing director of Alien Property Custodian in Philippine Islands) or his successors in office, subject to supervision of Alien Property Custodian. Sept. 13, 1918. 1 p. (No. 2959.) *State Dept.*

Aliens. Joint resolution authorizing readmission to United States of certain aliens who have been conscripted or have volunteered for service with military forces of United States or cobelligerent forces. Approved Oct. 19, 1918. 1 p. (Public resolution 44.)

Anarchists. Act to exclude and expel from United States aliens who are members of anarchistic and similar classes. Approved Oct. 16, 1918. 1 p. (Public 221.)

Arbitration. Agreement between United States and Great Britain, extending duration of convention of April 4, 1908; signed, Washington, June 3, 1918; proclaimed Sept. 30, 1918. 4 p. (Treaty series, 635.) *State Dept.*

Armistice. Terms of armistice signed by Germany, address of President to joint session of Congress, Nov. 11, 1918. 11 p. (H. doc. 1339.)

Army. Report on bill amending act to give indemnity for damages caused by American forces abroad so as to provide for prompt settlement of debts of deceased members of expeditionary forces. Oct. 10, 1918. 2 p. (S. rp. 589.)

———. Regulations for Army, 1913; corrected to April 15, 1917. 1918 [reprint with additions]. (War Dept. doc. 454.) Cloth, 60c.

<sup>2</sup> Where prices are given, the document in question may be obtained for the amount noted, from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Birds. Proclamation of amendments of and additions to migratory birds treaty act regulations, Oct. 25, 1918. 3 p. (No. 1490.) *State Dept.*

Cables, Submarine. Executive order, censorship of submarine cables, telegraph and telephone lines [amending Executive order of April 28, 1917, so as to include points on or near Mexican border]. Sept. 26, 1918. 1 p. (No. 2967.) *State Dept.*

———. Proclamation taking possession and control of marine cable systems. Nov. 2, 1918. 2 p. (No. 1492A.) *State Dept.*

Consular courts. Regulations for United States consular courts in China, with set of court forms used in American consular court at Shanghai, and act of July 1, 1870. 1918. 64 p. *State Dept.*

Copyright law of United States, act of March 4, 1909, in force July 1, 1909, as amended by acts of August 24, 1912, March 2, 1913, and March 28, 1914; with rules for practice and procedure under sec. 25, by Supreme Court. Edition of August, 1918. 80 p. (Bulletin 14.) *Library of Congress*. Paper, 10c.

Courts-martial. Manual for courts-martial, courts of inquiry, and of other procedure under military law. Revised edition corrected to Aug. 1, 1918. 1918. (War Dept. doc. 560.) Cloth, 65c.

Defensive Sea Areas. Executive Order revoking all Executive Orders heretofore issued for the establishment of. Jan. 25, 1919. (No. 3027.) *State Dept.*

Diplomatic and Consular Service. Diplomatic and consular service of United States, corrected to Aug. 31, 1918. 45 p. *State Dept.*

Economic Reconstruction. Analysis of main tendencies in principal belligerent countries of Europe, with statistics of production, consumption, and trade in important foodstuffs and industrial raw materials. 1918. 74 p. (Miscellaneous series, 73.) *Foreign and Domestic Commerce Bureau*. Paper, 10c.

Europe. Strategic map of central Europe showing international frontiers. 1918. 30c.

Exports. Conservation list effective Jan. 16, 1919, supersedes all previous export conservation lists. *War Trade Board*.

German-Bolshevik Conspiracy. Oct., 1918. 30 p. (War Information series 20.) *Public Information Committee*.

German East Africa. Black slaves of Prussia, letter to Lieut. Gen. J. C. Smuts relative to German rule in East Africa, by Frank Weston, Bishop of Zanzibar. 1918. 14 p. (S. doc. 296.)

Germany. Germany's confession, Lichnowsky memorandum. 1918. *Public Information Committee*.

Great War, 1914. Check list of literature and other material in Library of Congress on European War. 1918. 293 p. *Library of Congress*. Paper, 30c.

———. Spirit of coming era; address by Secretary of State, Oct. 10, 1918. 9 p. *State Dept.*

Greeks in United States. Act to authorize payment of indemnities to Greece for injuries inflicted on its nationals during riots occurring in South Omaha, Neb., Feb. 21, 1909. Approved Aug. 30, 1918. 1 p. (Public 212.)

Hungary. Affairs of Hungary, 1849-50; message from President of United States transmitting in response to Senate resolution of Dec. 7, 1909 [March 22, 1850], correspondence with A. Dudley Mann (1849-50), relating to affairs in Hungary, also additional papers transmitted by Secretary of State Robert Lansing to Senator Lodge on Sept. 10, 1918, relating to same subject. 1918. 64 p. (S. doc. 282.)

Inland Waterways. In response to resolution, report on commercial advantages of ship canals connecting Lake Erie and Lake Ontario, and Lake Ontario and Hudson River, with bibliography. 1918. 16 p. (S. doc. 301.) *Commerce Dept.*

Investments in Latin America and British West Indies, by Frederic M. Halsey. 1918. 544 p. (Special Agents' Series, 169.) *Foreign and Domestic Commerce Bureau*. Paper, 50c.

Licenses. Proclamation cancelling regulations requiring licenses for importation, etc., of certain food commodities. Jan. 7, 1919. (No. 1506-A.) *State Dept.*

———. Regulation 17 governing salt-water fishermen, contains all general and special rules issued up to Nov. 13, 1918, which affect salt-water fishermen catching and selling salt water fish, shellfish and crustaceans. Nov. 13, 1918. 16 p. *Food administration*.

Military service. Convention providing for reciprocal military service with France; signed, Washington, Sept. 3, 1918. 2 p. *State Dept.*

———. Convention providing for reciprocal military service with Greece; signed, Washington, Aug. 30, 1918. 3 p. *State Dept.*

Neutrality. Laws of neutrality as existing on Aug. 1, 1914. May, 1918. 578 p. *State Dept.* Paper, 35c.

Passports. Proclamation governing issuance of passports and granting of permits to depart from and enter United States, Aug. 8, 1918; Executive order, rules and regulations vesting power and authority in designated officers and making rules and regulations supplemental to proclamation of Aug. 8, 1918, governing departure from and entry into United States, Aug. 8, 1918. 56 p. *State Dept.*

Shipping. Executive order delegating to the United States Shipping Board certain powers relating to ocean freight rates and terminal charges. Dec. 3, 1918. 1 p. (No. 3017.) *State Dept.*

———. Hearing on bill for regulation of ocean freight rates, requisitioning of vessels and increasing powers of Shipping Board, Sept. 20, 1918. 160 p. *Commerce Committee.*

Trading with the Enemy. Executive order vesting power and authority in designated officers under Trading with the Enemy Act. Dec. 3, 1918. 2 p. (No. 3016.) *State Dept.*

———. Report on bill to amend act to define, regulate and punish trading with the enemy so as to insure permanence of licenses granted by American manufacturers of patented articles under this act. Nov. 21, 1918. 2 p. (S. rp. 612.) *Commerce Committee.*

———. Enemy trading list, No. 3, revised to Dec. 13, 1918, superseding all previous lists, supplements and announcements. *War Trade Board.*

———. Supplement, No. 1, to enemy trading list (revised), covering additions, removals and corrections to Jan. 24, 1919. *War Trade Board.*

H. K. THOMPSON.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF  
INTERNATIONAL LAW

EX PARTE LARRUCEA ET AL.

*District Court, Southern District of California*

October 6, 1917

[249 Fed. Rep. 981]

BLEDSON, District Judge. Pursuant to petitions filed, an order to show cause why writs of habeas corpus should not issue was entered. Upon the hearing it developed that the above-named petitioner, with three of his countrymen, are citizens of the kingdom of Spain; for some years they have been domiciled within the United States, and each of them has heretofore filed his declaration of intention to become a citizen of the United States under the naturalization laws thereof; they were arrested off the shore of Mexico by a United States war vessel and are now detained under appropriate process by the marshal of the district as for evading the Conscription Act hereinafter referred to.

Petitioners claim that when taken into custody they were proceeding on their way to Spain. There is no issue as to the facts, and the single question presented is whether or not the petitioners are subject to the provisions of the Conscription Law. Their claim in that belief is that, owing to a treaty between Spain and the United States, they are exempt from all forms of compulsory military service in the United States, and under the undoubted law of nations had the right, in spite of the Conscription Law, to leave the United States and return to the land of their nativity. Moore, International Law Digest, vol. 4, page 52.

The existing treaty between Spain and the United States, proclaimed April 20, 1903, provides in article 5 (33 Stat. 2108):

The citizens or subjects of each of the high contracting parties shall be exempt in the territories of the other from all compulsory military service by land or sea, and from all pecuniary contributions in lieu of such, as well as from all obligatory official functions whatsoever. Malloy's Treaties and Conventions, vol. 2, page 1701.

The claims of petitioners are resisted by the Government of the United States on the ground that the Conscription Law provides in express terms for their subjection to compulsory military service, and that, being later in date than the treaty with Spain, it controls, and that, in consequence, they should be remanded for trial. With this contention, upon a careful reading of the law, I am constrained to concur.

[1] Article 6 of the federal Constitution provides that:

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land.

It has long been the rule of decision in the United States, however, that in so far as the judicial department of the Government is concerned a treaty occupies no position of superiority over an act of Congress. They are on a parity in so far as the provisions of the Constitution are concerned, and, like other expressions of the legislative will, when inconsistent or irreconcilable, the latest in point of time must control. *Cherokee Tobacco Cases*, 11 Wall. 616, 621, 20 L. Ed. 227; *Head Money Cases*, 112 U. S. 580, 598, 5 Sup. Ct. 247, 28 L. Ed. 798. In the event, then, of a conflict between an earlier treaty and a later act of Congress, the Courts are bound to accord to the act of Congress compelling authority, and remit one who claims rights or privileges under the treaty, which are denied to him by the act of Congress, to the political department of the Government. *Tobacco Cases*, *supra*. In other words, in such an exigency, if the country with whom the treaty has been ratified is dissatisfied with the action of the legislative department of our Government, it may present its complaint to the executive head thereof, and take such other measures as it may deem necessary for the protection of its interests. The courts thereof, however, which are bound to act in conformity with the constitutional mandates of Congress, can afford no redress. *Whitney v. Robertson*, 124 U. S. 194, 8 Sup. Ct. 456, 31 L. Ed. 386.

[2] The Conscription or Selective Draft Law, being the act "to authorize the President to increase temporarily the military establishment of the United States," approved May 18, 1917, "in view of the existing emergency, which demands the raising of troops in addition to those now available," and authorizing the organizing

and equipping of more than a million men under arms by selective draft, provided in Section 2 thereof that:

Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies, who have declared their intention to become citizens, between the ages of 21 and 30 years, both inclusive.

In Section 4 certain federal, state, and other officers, ministers of religion, theological students, and members of the military and naval service of the United States are declared exempt; and it is also stated that nothing in the act contained shall be construed to require or compel the service of any member of a well-recognized religious sect, whose religious convictions are against war, etc. Provision is also made for partial exemption of other named classes. Section 5 provided that:

All male persons between the ages of 21 and 30, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men in the regular army, the navy, and the National Guard and Naval Militia, while in the service of the United States, to present themselves for and submit to registration under the provisions of this act: . . . Provided further, that persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, *and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempt or excused therefrom as in this act provided.* (Italics supplied.)

Section 14, the concluding section of the act, is to the effect that:

All laws and parts of laws in conflict with the provisions of this act are hereby suspended during the period of this emergency.

No provision is made anywhere in the act for positive exemptions from service other than those referred to; and no mention at all is made of any exemption because of treaties with any foreign nation. The language of the act requiring all male persons between the stated ages to register and providing that all persons so registered shall be and remain subject to draft "unless exempted or excused therefrom *as in this act provided*," makes it impossible for me to conclude that

it was intended by the act to exempt citizens of Spain or of other countries possessing similar treaty rights. •

The particular claim is made by the petitioners that the language of Section 2, to the effect that the draft "shall be based upon *liability to military service*," is conclusive of an intent upon the part of Congress in the passage of this act to exclude from the operation of the act those who were not liable to military service because of some treaty provisions. It is perhaps difficult to appreciate just exactly what Congress had in mind in the use of the phrase "liability to military service"; there being no general law to which my attention has been called definitely establishing and fixing "liability to military service" under the laws of the United States. It has been the attitude of our State Department, from the time of Mr. Madison, when he was Secretary thereof, that resident aliens not naturalized are not liable to perform military service. Moore, *International Law Digest*, vol. 4, pages 51 to 65. Of course, the execution of a mere "declaration of intention" does not constitute naturalization. Moore's *Digest*, vol. 3, p. 336. The Congress, in the Draft Law of 1863 (Act March 3, 1863, c. 75, 12 Stat. 731), however enacted:

That all able-bodied male citizens of the United States, and *persons of foreign birth who shall have declared their intention to become citizens* under and pursuant to the laws thereof, between the ages of 20 and 45 years, except as hereinafter excepted, are hereby declared to constitute the national forces and shall be liable to perform military duty in the United States when ordered out by the President for that purpose.

By Act April 22, 1898 (30 Stat. 361, c. 187, § 1 [Comp. St. 1916, § 1714]) it was provided:

That all able-bodied male citizens of the United States, and *persons of foreign birth who shall have declared their intention to become citizens of the United States* under and in pursuance of the laws thereof, between the ages of 18 and 45 years, are hereby declared to constitute the national forces, and, with such exceptions and under such conditions as may be prescribed by law, shall be liable to perform military duty in the service of the United States.

By the terms of the act passed January 21, 1903, which was subsequent to the negotiation of the treaty with Spain, though prior to its ratification or promulgation, it was provided that the militia should consist of "every able-bodied male citizen," and every "*able-bodied male of foreign birth who has declared his intention to become*



a citizen," between the ages of 18 and 45. 32 Stat. 775, c. 196. It may have been that the phrase "liability to military service" was borrowed from the previous acts. It would seem as if the present Draft Act were in completest harmony with other military service statutes in that behalf. Be that as it may, however, the act does provide in express terms that the draft shall be based upon liability to military service of all male citizens and all male persons not alien enemies who have *declared* their intention to become citizens, and, as above recited, contains the further provision that of all persons registered none shall be exempt from service, unless exempt or excused "as in the act provided." The language seems indicative of such a "positive repugnancy" (*Chew Heong v. United States*, 112 U. S. 536, 549, 5 Sup. Ct. 255, 28 L. Ed. 770) to the terms of the treaty with Spain as to leave no room for the conclusion that they can be read together, and that Congress was intending that citizens of Spain, as well as of other countries, who had declared their intention of becoming citizens of the United States under the naturalization laws, should be subject to the demands of the emergency. The conclusion here announced is confirmed in a degree by the concluding section of the act, suspending all laws in conflict with it during the period of the emergency.

It follows that the court, conceiving it to be its duty to follow the intent of Congress, must needs remand the petitioners to such relief as may be accorded to them by the political department of the Government. The order to show cause is discharged, and the writs petitioned for are denied.

SWAYNE AND HOYT, INC. V. EVERETT

*United States Circuit Court of Appeals, Ninth District*

January 6, 1919.

ROSS, Circuit Judge. This case comes here from the United States Court for China. It is a writ of error sued out by the defendant to an action there brought by the present defendant in error to recover damages for the refusal of the plaintiff in error, a common carrier, to receive, without lawful excuse, certain cargo offered it by the plaintiff to the action for shipment from Shanghai by the steamer

*Yucatan*, which had been advertised to be on the berth at Shanghai for freight to San Francisco.

The facts are practically undisputed, and are, briefly, these:

Swayne & Hoyt was a California corporation having its principal place of business at San Francisco, and was therefore an American citizen, and was a common carrier of freight between the Orient and that city among other places. It had as its agent at Shanghai a British corporation styled Jardine, Matheson & Company, Limited, and had under charter the said steamship for a voyage from San Francisco to China and Japan and return to San Francisco and other Pacific coast ports of the United States.

Prior to the arrival of the *Yucatan* at Shanghai the plaintiff in the case applied to the agent of the defendant thereto for space in the ship in which to ship certain goods, in response to which application, after one denial of it, the agent agreed to provide the requested space upon condition that the application be approved by the British Consul at Shanghai. That conditional acceptance was refused. The cargo offered for shipment by the plaintiff was being handled by him for German subjects, by reason of which fact he was blacklisted by the British Government, and all British subjects, including the agent of the defendant corporation, inhibited from dealing with the plaintiff respecting this particular shipment as well as all other such shipments. The defendant through its British agent having refused to accept the cargo offered by Everett, the action was brought, resulting in the judgment of the court below in his favor for \$2,720.20, with costs.

But two questions of law are involved, first, whether the court below had jurisdiction of the subject-matter of the action, and, if so, then secondly, its merits.

By Section 1 of the Act of June 30, 1906, creating the court below (34 Stat. Lg. 814), that court is given "Exclusive jurisdiction in all cases and judicial proceedings whereof jurisdiction may now be exercised by United States consuls and ministers by law and by virtue of treaties between the United States and China, except in so far as the said jurisdiction is qualified by Section Two of this Act." The qualification specified in Section 2 of the Act has no bearing upon the present case, and, therefore, no further mention of it need be made.

At the time of the passage of the Act of June 30, 1906, there were in force the provisions of Sections 4083, 4084, and 4085 of the Revised

Statutes, by which certain judicial authority was conferred upon United States ministers and consuls in certain countries, including China, which jurisdiction embraced all controversies between citizens of the United States or others, provided for by its treaties.

The treaty with China bearing upon the present question was that of June 18th, 1858 (12 Stats. Lg., p. 1029), and conferred upon the United States the right to appoint consuls in various parts of China. Its XXVII Article is as follows:

All questions in regard to rights, whether of property or person, arising between citizens of the United States in China, shall be subject to the jurisdiction and regulated by the authorities of their own government; and all controversies occurring in China between citizens of the United States and the subjects of any other government shall be regulated by the treaties existing between the United States and such governments, respectively, without interference on the part of China.

It is the contention of the plaintiff in error that the words "in China" in the foregoing Article qualify the word "citizens" and not the word "arising"; in other words, that a residence of the parties in China is essential to the existence of any jurisdiction in the court. We think it obvious that such a construction of the provision is wholly inadmissible, for the subject-matter thereby dealt with is *controversies arising in China*. The first clause of the provision relates to controversies in regard to rights, whether of property or person, there arising between citizens of the United States, and declares that they shall be subject to the jurisdiction and be regulated by the authorities of their own government; and by its second clause it is declared that all such controversies there arising between citizens of the United States and the subjects of any other government, shall be regulated by the treaties existing between the United States and such governments, respectively—in each instance without interference on the part of China. We regard it as clear that this is the very plain meaning of the article in question. As said by counsel for the defendant in error, the bare reading of its second clause is all that is necessary to show that the words "in China" there used, fixes, as the basis of the jurisdiction of the court, the place of the origin of the controversy, and not the residence of the parties thereto. No sound reason is suggested why a like construction should not be placed upon the first clause. To adopt the view urged by the plaintiff in error would be, in effect, to hold a consular court in China

vested with jurisdiction of a controversy between American citizens arising in the United States if they happened to be residents of China.

Upon the merits we think the case equally clear.

It does not admit of doubt that a common carrier, with certain well-established exceptions, is under legal obligation to carry the goods of any member of the public who may tender them for carriage. That such a carrier subject to such legal obligation may show that it was prevented from performing it by act of God or a public enemy, or by some other cause over which it had no control, is readily conceded, but in all such cases the defense is an affirmative one, and the burden is upon the carrier to both plead and prove it. 1 *Michie on Carriers*, Sec. 381; *Chicago, etc. R. R. Co. v. Wolcott*, 39 N. E. Rep. 451.

At the time of the occurrences in question, England and Germany were at war, but the United States was not; on the contrary, this country was then observing strict neutrality between those belligerents. How, then, can it be properly held that the performance of the clear legal duty of an American carrier to receive and transport goods tendered for carriage, by an American citizen, is excused on the ground that the British Government had forbidden its citizens and corporations, one of which happened to be the agent of the American carrier, from receiving the tendered freight and providing for its transportation? Such is not the law as we understand it. See, *Richards & Co., Inc. v. Wrechsner*, 156 N. Y. Supp. 1054, and the numerous cases there cited.

It is contended on behalf of the carrier that there was no evidence to show that it knew that its agent at Shanghai was inhibited by the British Government from shipping the goods of the plaintiff in time to have employed an agent not under such disability. Whether or not the carrier knew of the inhibition at all, or was apprised of it in time to have employed another agent, the fact remains that the agent it did appoint, acting within the scope of his employment, deprived the plaintiff of his legal right. For that wrong we think the carrier was properly adjudged liable, even assuming that it was ignorant of its agent's disability. See *Chesapeake & Ohio R. Co. v. Francisco*, 149 Ky. 307.

*The judgment is affirmed.*

## THE STIGSTAD

*Judicial Committee of the Privy Council. (Lord Sumner, Lord  
 Parmoor, Lord Wrenbury, Lord Sterndale, and Sir  
 Arthur Channell)*

December 16, 1918

Appeal by neutrals from a judgment of the High Court of Admiralty (in prize) against their claim for damages for detention of vessel.

Lord Sumner, in moving that the appeal be dismissed, said:

The appellants in this case were claimants below. They are a Norwegian company which manages the steamship *Stigstad* for her owners, the *Klaveness Dampskibsaktieselskab*, a Norwegian corporation. While on a voyage, begun on April 10, 1915, from Kirkenes, Sydvaranger, in Norway, to Rotterdam, with iron-ore briquettes, the property of neutrals, she was stopped in lat. 56 deg. 9 min. N. and long. 6 deg. 6 min. E., about a day's sail from Rotterdam, by H.M.S. *Inconstant*, and was ordered to Leith and thence to Middlesborough to discharge. Their claim for "(1) freight, (2) detention, and (3) expenses consequent upon" this seizure and the discharge at Middlesborough afterward. The detention was measured by the number of days which elapsed between the expected date of completing discharge at Rotterdam and the actual date of completing discharge at Middlesborough, calculated at the chartered rate for detention, viz., £130 per day; and as to the expenses, while willing to treat port dues and expenses at Middlesborough as the equivalent of those which would have been incurred at Rotterdam, the owners claimed some port dues and expenses at Leith and a few guineas for special agency expenses at Middlesborough. Eventually the cargo was sold by consent, and a sum, the amount of which was agreed between the parties, was ordered to be paid out of the proceeds to the claimants for freight; but the late Sir Samuel Evans dismissed the claims for detention and for the special expenses. It is against his decree that the claimants have now appealed. They have admitted throughout that, in fact, the cargo of iron-ore briquettes was to be discharged into Rhine barges at Rotterdam in order to be conveyed into Germany.

The cargo was shipped by the *Aktieselskab Sydvaranger*, of

Kirkenes, and was to be delivered to V. V. W. Van Drieh and Stoomboot en Transport on der Nemingen, both neutrals, but it is contended that Section 3 of the Order in Council, dated March 11, 1915, warranted interference with the ship and her cargo by his Majesty's Navy on the voyage to Rotterdam. The President's directions as to freight were that "the fair freight must be paid to them, having regard to the work which they did," the principle which he had laid down in the *Juno* (1 Trehern 151) being, in his opinion, applicable. The claim for detention is in truth a claim for damages for interfering with the completion of the chartered voyage, for it is admitted that delivery was taken at Middlesborough with reasonable dispatch. That part of the claim which relates to the ship's being ordered to call at Leith, and the claim for expenses incurred there, are claims for damages for putting in force the above-named Order in Council, for it is not suggested that the order to call at Leith and thence to proceed to Middlesborough was in itself an unreasonable way of exercising the powers given by the Order. The small claim for fees at Middlesborough seems to relate to an outlay incident to the earning of the freight which has been paid, and was covered by it, but, if it is anything else, it also is a claim for damages of the same kind. "Damages" is the word used by the President in his judgment, and, although it was avoided and deprecated in argument before their Lordships, there can be no doubt that it and no other word is the right word to describe the nature of the claims under appeal.

It is impossible to find in the express words of the Order any language which directs that such damages should be allowed, nor are the principles applicable which have been followed in the *Anna Catharina* (6 Ch. Rob. 10) and elsewhere as to allowance of freight and expenses to neutral ships, whatever be the exact scope and application of those cases. Again, with the fullest recognition of the rights of neutral ships, it is impossible to say that owners of such ships can claim damages from a belligerent for putting into force such an Order in Council as that of March 11, 1915, if the order be valid. The neutral exercising his trading rights on the high seas and the belligerent exercising on the high seas rights given him by Order in Council or equivalent procedure, are each in the enjoyment and exercise of equal rights, and, without an express provision in the order to that effect, the belligerent does not exercise his rights

subject to overriding right in the neutral. The claimant's real contention is, and is only, that the Order in Council is contrary to international law and is invalid.

Upon this subject two passages in the *Zamora* (1916 2 A. C., 77) are in point. The first is at page 95, and relates to Sir William Scott's decision in the *Fox* (Edw., 311):

The decision proceeded upon the principle that, where there is just cause for retaliation, neutrals may by the law of nations be required to submit to inconvenience from the act of a belligerent Power greater in degree than would be justified had no just cause for retaliation arisen, a principle which had already been laid down in the *Lucy*.

Further, at page 98, are the words:

An order authorizing reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of his Majesty's advisers, are the best or only means of meeting the emergency; but this will not preclude the right of any party aggrieved to contend, or the right of the Court to hold that these means are unlawful as entailing on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case.

It is true that in the *Zamora* the validity of a retaliatory Order in Council was not directly in question, but those passages were carefully considered and advisedly introduced as cogent illustrations of the principle, which was the matter then in hand. Without ascribing to them the binding force of a prior decision on the same point, their Lordships must attach to them the greatest weight and, before thinking it right to depart from them, or even necessary to criticize them to any great length, they would at least expect it to be shown either that there are authoritative decisions to the contrary, or that they conflict with general principles of Prize Law or with the rules of common right in international affairs.

What is here in question is not the right of the belligerent to retaliate upon his enemy the same measure as has been meted out to him, or the propriety of justifying in one belligerent some departure from the regular rules of war on the ground of necessity arising from prior departures on the part of the other, but it is the claim of neutrals to be saved harmless under such circumstances from inconvenience or damage thereout arising. If the statement above quoted from the *Zamora* be correct, the recitals in the Order in

Council sufficiently establish the existence of such breaches of law on the part of the German Government as justify retaliatory measures on the part of his Majesty, and, if so, the only question open to the neutral claimant for the purpose of invalidating the order is whether or not it subjects neutrals to more inconvenience or prejudice than is reasonably necessary under the circumstances.

Their Lordships think that such a rule is sound, and, indeed, inevitable. From the nature of the case the party who knows best whether or not there has been misconduct calling such a principle into operation, is a party who is not before the court, namely, the enemy himself. The neutral claimant can hardly have much information about it, and certainly cannot be expected to prove or disprove it. His Majesty's Government, also well aware of the facts, has already by the fact as well as by the recitals of the Order in Council solemnly declared the substance and effect of that knowledge, and an independent inquiry into the course of contemporary events, both naval and military, is one which a Court of Prize is but ill-qualified to undertake for itself.

Still less would it be proper for such a Court to inquire into the reasons of policy, military or other, which have been the cause and are to be the justification for resorting to retaliation for that misconduct. Its function is, in protection of the rights of neutrals, to weigh on a proper occasion the measures of retaliation which have been adopted in fact, and to inquire whether they are in their nature or extent other than commensurate with the prior wrong done, and whether they inflict on neutrals, when they are looked at as a whole, inconvenience greater than is reasonable under all the circumstances. It follows that a Court of Prize, while bound to ascertain, from the terms of the order itself, the origin and the occasion of the retaliatory measures for the purpose of weighing those measures with justice as they affect neutrals, nevertheless ought not to question, still less dispute, that the warrant for passing the order, which is set out in its recitals, has in truth arisen in the manner therein stated.

Although the scope of this inquiry is thus limited in law, in fact their Lordships cannot be blind to what is notorious to all the world and is in the recollection of all men, the outrage, namely, committed by the enemy upon law, humanity and the rights alike of belligerents and neutrals, which led to, and, indeed, compelled the adoption of some such policy as is embodied in this Order in Council. In con-



sidering whether more inconvenience is inflicted upon neutrals than the circumstances involve, the frequency and the enormity of the original wrongs are alike material, for the more gross and universal those wrongs are, the more are all nations concerned in their repression, and bound for their part to submit to such sacrifices as that repression involves.

It is right to recall that, as neutral commerce suffered and was doomed to suffer gross prejudice from the illegal policy proclaimed and acted on by the German Government, so it profited by and obtained relief from retaliatory measures if effective to restrain, to punish and to bring to an end such injurious conduct. Neutrals, whose principles or policy lead them to refrain from punitive repressive action of their own, may well be called on to bear a passive part in the necessary suppression of courses which are fatal to the freedom of all who use the seas.

The argument principally urged at the Bar ignored these considerations and assumed an absolute right in neutral trade to proceed without interference or restriction, unless by the application of the rules heretofore established as to contraband traffic, unneutral service, and blockade. The assumption was that a neutral, too pacific or too impotent to resent the aggressions and lawlessness of one belligerent, can require the other to refrain from his most effective or his only defence against it, by the assertion of an absolute inviolability for his own neutral trade, which would thereby become engaged in a passive complicity with the original offender.

For this contention no authority at all was forthcoming. Reference was made to the Orders in Council of 1806 to 1812, which were framed by way of retaliation for the Berlin and Milan decrees. There has been much discussion of these celebrated instruments on one side or the other, though singularly little in decided cases or in treaties of repute, and, according to their nationality or their partisanship, writers have denounced the one policy or the other, or have asserted their own superiority by an impartial censure of both. The present order, however, does not involve for its justification a defence of the very terms of those Orders in Council. It must be judged on its merits, and, if the principle is advanced against it that such retaliation is wrong in kind, no foundation in authority has been found on which to rest it.

Nor is the principle itself sound. The seas are the highway of

all, and it is incidental to the very nature of maritime war that neutrals, in using that highway, may suffer inconvenience from the exercise of their concurrent rights by those who have to wage war upon it. Of this fundamental fact the right of blockade is only an example. It is true that contraband, blockade, and unneutral service are branches of International Law which have their own history, their own illustrations, and their own development. Their growth has been unsystematic, and the assertion of right under these different heads has not been closely connected or simultaneous. Nevertheless, it would be illogical to regard them as being in themselves disconnected topics, or as being the subject of rights and liabilities which have no common connection. They may also be treated, as in fact they are, as illustrations of the broad rule that belligerency and neutrality are states so related to one another that the latter must accept some abatement of the full benefits of peace in order that the former may not be thwarted in war in the assertion and defence of what is the most precious of all the right of nations, the right to security and independence. The categories of such cases are not closed. To deny to the belligerent, under the head of retaliation, any right to interfere with the trade of neutrals beyond that which, quite apart from circumstances which warrant retaliation, he enjoys already under the head of contraband, blockade and unneutral service, would be to take away with one hand that which has formally been conceded by the other. As between belligerents acts of retaliation are either the return of blow for blow in the course of combat, or are the questions of the laws of war not immediately falling under the cognizance of a Court of Prize. Little of this subject is left to Prize Law beyond its effect on neutrals, and on the rights of belligerents against neutrals, and to say that retaliation is invalid as against neutrals, except within the old limits of blockade, contraband and unneutral service, is to reduce retaliation to a mere simulacrum, the title of an admitted right without practical application or effect.

Apart from the *Zamora*, the decided cases on this subject, if not many, are at least not ambiguous. Of the *Leonora* (1918, p. 182), decided on the later Order in Council, their Lordships say nothing now, since they are informed that it is under appeal to their Lordships' Board, and they desire on the present occasion to say no more, which might affect the determination of that case, than is indispensable to the disposal of the present one.

Sir William Scott's decisions on the retaliatory Orders in Council

were many, and many of them were affirmed on appeal. He repeatedly and in reasoned terms declared the nature of the right of retaliation and its entire consistency with the principles of International Law. Since then discussion has turned on the measures by which effect was then given to that right, not on the foundation of the principle itself, and their Lordships regard it as being now too firmly established to be open to doubt.

Turning to the question which was little argued, if at all, though it is the real question in the case, whether the Order in Council of March 11, 1915, inflicts hardship excessive either in kind or in degree upon neutral commerce, their Lordships think that no such hardship was shown. It might well be said that neutral commerce under this order is treated with all practicable tenderness, but it is enough to negative the contention that there is avoidable hardship. Of the later Order in Council they say nothing now. If the neutral ship-owner is paid a proper price for the service rendered by his ship, and the neutral cargo-owner a proper price according to the value of his goods, substantial cause of complaint can only arise if considerations are put forward which go beyond the ordinary motives of commerce and partake of a political character, from a desire either to embarrass the one belligerent or to support the other.

In the present case the agreement of the parties as to the amount to be allowed for freight disposes of all question as to the claimant's rights to compensation for mere inconvenience caused by enforcing the Order in Council. Presumably, that sum took into account the actual course and duration of the voyage, and constituted a proper recompense alike for carrying and for discharging the cargo under the actual circumstances of that service. The further claims are in the nature of claims for damages for unlawful interference with the performance of the Rotterdam charter-party. They can be maintained only by supposing that a wrong was done to the claimants, because they were prevented from performing it, for in their nature these claims assume that the shipowners are to be put in the same position as if they had completed the voyage under that contract, and are not merely to be remunerated on proper terms for the performance of the voyage, which was in fact accomplished. In other words, they are a claim for damages, as for wrong done by the mere fact of putting in force the Order in Council. Such a claim cannot be sustained. Their Lordships will humbly advise his Majesty that the appeal should be dismissed, with costs.

## BOOK REVIEWS

*The Commonwealth at War.* By A. F. Pollard. London: Longmans, Green & Co. 1917. pp. vi, 256. \$2.25 net.

It is not often that brilliancy goes hand in hand with learning and wisdom so continuously as it does along the pages of this volume. The book consists of a collection of essays, lectures, and newspaper articles by the Professor of History in the University of London, delivered or printed from time to time during the past four years. They are arranged for the most part in chronological order, and one gets the impression as to most if not all of them that they were evoked by the more or less critical conditions of public feeling and opinion that presented themselves from time to time during the course of the war. They have for this reason a vividness and vitality that are not too frequently characteristic of the work of profound and scholarly historians. It would not be possible for Professor Pollard to write anything that would be uninteresting, but the special interest of this volume is that, because of the circumstance referred to, it enables one to gain a particularly vivid conception of the realized as well as the frustrated hopes, the groundless as well as the justifiable fears, the true as well as the false judgments, amid which the people of England struggled through to the final victory for which they endured hardness as good soldiers for so many long and weary years.

The table of contents is certainly alluring, with its array of no less than nineteen titles. The author begins with a clear and powerful presentment of the causes of the war, laying particular emphasis upon the moral issues at stake. His second essay is a humorous but not the less philosophical treatment of the sometimes diverting and sometimes distracting rumors spread abroad in the earlier stages of the war, one of which will instantly be recalled, of the legendary Russian forces that embarked at Archangel and reached the western front by way of Leith and Southampton. Another, not so well-known, may be said to have deceived the very elect, as it appeared "not in a half-penny newspaper, but set out in the dignity and circumstance" of the *Fortnightly Review*, "over a familiar but pseudonymous signature."

Space does not permit any detailed reference to these attractive titles, but there is one essay that is particularly timely, in which the author discusses "the growth of an Imperial Parliament." This admirable chapter is the Creighton Lecture, delivered before the University of London in October, 1916. The doctrine of the essay, if it is permissible to use so formidable a term—the idea that is expanded and illustrated by the lecturer, is closely connected with the conviction which led him to choose as a title for his volume, "The Commonwealth at War," rather than "The Empire at War." In one of the following chapters the writer recalls the well-known jest of Voltaire that the Holy Roman Empire was so-called because it was neither holy nor Roman nor an empire, which he makes good use of as his introduction to a reminder that "the British Empire is only an empire in a sense which makes nonsense of the word; for it is like no other empire that ever existed, and it would certainly smell as sweet if called by any other name." The substance of this Creighton lecture, then, is a convincing historical argument against the school of Colonial and perhaps the smaller one of Imperial thinkers and publicists who are anxious to bring about some more definite constitutional relations than those which now exist between the mother-country and the so-called colonies of the empire. Without condemning entirely the desire evinced by this class of political thinkers for some conscious and deliberate effort in the promotion of Imperial unity, he administers a very timely and useful lesson to them by explaining the bearing of the antithesis between growth and manufacture upon the past and future of British parliamentary institutions. "If our forefathers consciously created first an English and then a British parliament to meet the needs of these islands, then," says the writer, "we may hope by conscious effort to create a new Imperial parliament to satisfy the wider claims of a British empire. If, on the other hand, Parliament as it exists to-day was never designed or created by any conscious volition, then the argument in favor of the possibility of a new and special creation loses some of its force."

His illustrations of the development of British institutions by growth rather than by manufacture are most striking, and some of them must prove surprising to all but the best-instructed of historical scholars. It is no new discovery that Alfred the Great was not the inventor of trial by jury; that it was not an Anglo-Saxon institution at all, nor a popular institution designed to protect the liberty of the

subject, but a royal expedient, introduced from abroad in the interests of the treasury. Possibly it is not so well-known that Henry II developed our judicial system, not for the sake of justice, but for the rewards or fines which justice brought into the royal exchequer, the incidental development of the beginnings of a system of common law being merely a by-product of his judicial establishment. "None of the great elements of the British constitution was deliberately made." "The history of Parliament is a record of human action in which human design has played an almost insignificant part." "No one designed either the House of Lords or the House of Commons." The British Cabinet, as everybody knows, for Macaulay told us that many years ago, is an institution wholly unauthorized by any written statute or resolution or record or any writing of any kind whatsoever. "The premiership was regarded as an obnoxious importation from France. George Grenville declared it an odious title, and Lord North forbade its use in his household."

Coming to closer quarters with the problem of Imperial consolidation, the lecturer points out among other things how well the British Empire got along when the ties between the homeland and the British colonies were similar to the present relations between Britain and Canada, how tragically it fell to pieces when Grenville and Townshend insisted on regularizing the relations between the mother and the daughter and "reducing to logical form the heterogeneous substance" of the commonwealth. Before Grenville's financial pedantry set the colonies and the motherland by the ears the New Englanders were the mainstay of the Imperial fabric on this side of the Atlantic. Nicholson, with his fleet and his New England troops, had captured Port Royal in 1710 and changed its name to Annapolis, in honor of the reigning sovereign. Governor Shirley, of Massachusetts, had sent out Sir William Pepperel to take Louisbourg from the French in 1745. If well enough had been let alone and the "salutary neglect" of the colonies had only been permitted to continue there would not have been the hundred and more years of alienation which required the agony of a world-wide war in order to completely cure it. Surely, in the light of such a lesson, and with the experience of the splendid results achieved in the European war under the loose and voluntary system or want of system which is at present enjoyed throughout the British Commonwealth the burden is upon those who call for any radical operation in the way of regularizing the relations between

its various constituents. Professor Pollard looks to the Privy Council as an agency through which may possibly be brought about the wider, all-embracing parliament of the whole united commonwealth. His discussion of this possibility is unconvincing. More to the purpose, and as eloquent as it is convincing, is the closing paragraph of this splendid lecture—"Essential unity has come in bountiful measure to British realms in this war, not because they sought that unity for itself but because they found it in the pursuit of a common ideal; in the defence of a common principle; formal unity may come in the course of time, but not because we strive to create it. It will grow as the outward sign of an inward grace, achieved through a communion of service and self-sacrifice for the Commonwealth of nations and the common weal of man."

B. RUSSELL.

*Reports to the Hague Conferences of 1899 and 1907.* Publication of the Carnegie Endowment for International Peace, Division of International Law. Edited, with an introduction, by James Brown Scott, Director. Oxford: At the Clarendon Press. 1917. pp. xxxii, 940:

When the Third Hague Peace Conference convenes it will be confronted with a task of reconstruction. Of the conventions concluded by the earlier Conferences of 1899 and 1907, the agreements concerning belligerent rights and duties have proven ineffectual since August, 1914, partly because of a Teutonic determination to brook no interference with strategic aims or military achievement, and partly also because the conventions were the product of an endeavor to secure harmony of action at the expense of principle.

It has become, therefore, necessary to examine afresh, in the light of the European War, what was proposed as well as what was agreed upon in 1899 and 1907. The publication of the Reports to the Hague Conferences issued by the Carnegie Endowment and edited by Dr. Scott serves to bring home the task of examination and criticism to American students generally.

The volume embraces an English translation of the "official explanatory and interpretative commentary accompanying the draft conventions and declarations submitted to the conferences by the several commissions charged with preparing them, together with the texts

of the final acts, conventions and declarations as signed, and of the principal proposals offered by the delegations of the various powers as well as of other documents laid before the commissions."

The reports may serve to attract attention in the United States to the efforts of certain powers in 1907 to minimize restrictions tending to interfere with belligerent claims. Formal manifestations of intolerance were at times concealed, however, under the cloak of professions of a determination to respect the dictates of humanity. The remarks of Baron Marschall von Bieberstein, of the German delegation, on the codification of rules concerning mines may be cited:

That a belligerent who lays mines assumes a very heavy responsibility toward neutrals and toward peaceful shipping is a point on which we all agree. No one will resort to this instrument of warfare unless for military reasons of an absolutely urgent character. But military acts are not solely governed by stipulations of international law. There are other facts. Conscience, good sense, and the sense of duty imposed by principles of humanity will be the surest guides for the conduct of sailors and will constitute the most effective guarantee against abuses. The officers of the German navy, I loudly proclaim it, will always fulfil, in the strictest fashion, the duties which emanate from the unwritten law of humanity and civilization (p. 692).

In his extended preface the editor has called attention to the instructions given by Secretary Root to the American delegation in 1907, who declared that "among the most valuable services rendered to civilization by the Second Conference will be found the progress made in matters upon which the delegates reach no definite agreement." Events have proven the truth of this assertion. The reports to that Conference, in so far as they illustrate the influence of national policies upon the formulation of desired codes of law, remain of utmost value and are to be reckoned with in any future attempt to effect codification.

Dr. Scott has commented adversely on the situation which permitted the President of the Second Conference, Mr. Nelidow, the first Russian delegate, to regulate its procedure and to propose the Secretary General and certain other officers. In this connection it is said:

The president of a continental assembly believes it to be his duty to run the congress, and he faithfully performs this part of his duty. He is as far removed as the poles from the Anglo-American conception of the chairman, who is merely the presiding officer of the meeting. These matters will no doubt be satisfactorily arranged by the preparatory committee for the Third Conference, in which it is to be hoped that there will be representatives of countries other than the friends of friends.



The chief contribution of the United States to the Second Hague Peace Conference concerned matters pertaining to the pacific settlement of international disputes; and that contribution was not in vain, even though no convention applying the principle of obligatory arbitration or setting in operation the proposed Court of Arbitral Justice was concluded. The reports issued by the Carnegie Endowment offer the means of wide and thorough examination in America of that work, and which would otherwise be necessarily confined to the small group of scholars having access to the official proceedings of the Second Conference (known as *La Deuxième Conférence Internationale de la Paix, Actes et Documents*). The reports also inspire hope of a more popular interest and concern in what should be the policy of the United States respecting the modification and formulation of the laws of war on land and sea than would otherwise be possible. It is a difficult task to create in any country an enlightened and therefore sound opinion on technical problems of international law, and one really useful to the government burdened with the formulation of a constructive policy. In the United States this difficulty has been serious. The reports to the Hague Conferences offer aid in its solution; for there is now placed within the reach of the American public a simple and direct means of comparing the theories advocated from day to day in various quarters, with the discussions of statesmen reflecting every shade of opinion within less than seven years of the outbreak of the European War. By this accomplishment the Carnegie Endowment, and its editor have rendered a distinctly useful service, to which the reviewer acknowledges his own indebtedness.

Tables of signatures, ratifications, adhesions and reservations to the conventions and declarations of the Conferences of 1899 and 1907, are given. An index of persons as well as a general index are appended. The translations of the reports and annexes thereof are the work of Messrs. W. Clayton Carpenter, Henry G. Crocker and George D. Gregory.

CHARLES CHENEY HYDE.

*From Isolation to Leadership: A Review of American Foreign Policy.*

By John Holladay Latané, Ph.D., LL.D. New York: Doubleday, Page & Company. 1918. pp. viii, 215. \$1.00.

The central thread of the ten chapters of this small timely volume is the question of participation in world politics—either in protection of American rights and principles or by cooperation in affairs of general interest.

Although the volume evidently is largely a growth from earlier studies in diplomatic relations and from preparation of addresses delivered at various universities or before political and international associations, its present appearance was doubtless influenced by the President's bold announcement of January 22, 1917, proposing that the nations should adopt the Monroe Doctrine as the doctrine of the world and disentangle themselves from secret alliances by the establishment of a concert of powers through a League to Enforce Peace, and also by the astonishing achievement of America in organizing and transporting fighting forces which turned the tide of battle against the vast and long-prepared military organization of the Central Powers led by the military masters of Germany.

It is not a presentation of new materials, but a clear and well-articulated statement, a progressive and judicial summary and interpretation, of a large mass of facts which the author has digested and assimilated. Seizing main points, the author presents them in continuity of development, avoiding tiresome details, and without footnote references or bibliographic appendix. He adds a convenient index.

Necessarily, as planned, the book omits many incidents which one might expect or wish to find mentioned. It contains no reference to the early applications of American policy against the Barbary pirates, or in connection with the acquisition of Louisiana and Florida, or in the early American relations in the Caribbean and the contiguous territory of Central America and Mexico, or in the opening of relations in China and the Hawaiian Islands.

The writer is accurate in his historical statements, but he has introduced several historical hypotheses (pp. 33, 53, 87, 93-94, 186) which he admits are of little practical value (p. 11).

The book will prove satisfactory and useful to the student of inter-

national questions, and is especially adapted to the use of the general reader who does not have the time for a fuller treatise.

Dr. Latané briefly sketches the essential features in the development of the two chief phases of American foreign policy—the traditional policy of political isolation and the Monroe Doctrine, between which he makes a clear distinction which many writers have not made.

Dr. Latané too strongly emphasizes the idea that American maintenance of the doctrine without resort to force has really rested only on the existence of a nicely adjusted European balance of power resulting in the rise of diverting European situations at critical times when the doctrine was threatened by some European power which might have put it to the test of actual war (p. 146).

Referring to American participation at the Algeiras conference as the "most radical departure" from the American traditional policy of isolation, nevertheless, in view of what has since happened, he justifies the secret diplomacy and motives of Roosevelt as a positive factor in preserving the balance of power in Europe and thwarting the relentless attempt of the German Kaiser to humiliate France (p. 76).

He indicates that American diplomacy in the Orient has had a freer hand, illustrated by Perry's Japan expedition, which he regards as a radical departure from the general American isolation policy, and later by the retention of the Philippines not only as a naval base but also to prevent the precipitation of a world war by German seizure of the islands (p. 85).

In a brief review of Anglo-American relations, he suggests the possibility of a closer Anglo-American understanding and cooperation.

The author devotes a chapter to the natural and inevitable imperialistic tendencies appearing in protectorates and receiverships and financial supervision in the Caribbean since 1898, which converted American policy into law (p. 146) and caused Latin American attacks on the Monroe Doctrine on the ground that it has thus been violated. These so-called imperialistic policies, if administered in an unselfish spirit, the author declares are not inconsistent with the recent general war aims defined by Wilson (p. 165).

The traditional policy of isolation from world politics, justified in the early experimental days of American democracy as a quarantine against the fatal disease of militarism, long remained a mere tradition or popular delusion which restricted America in the face of opportunities for useful service, and bred a complacency of effortless contem-

plation which made her indifferent to international responsibilities and as selfish as the predatory powers from which it held her aloof. But, under new conditions resulting in closer neighborhood, and in the complexity of diplomacy resulting from the emergence of Japan as a first class world power, it finally became an impossibility and was dispelled and abandoned under the conditions of the unequal world conflict between aggressive, merciless might and defensive right. The final decision against it, as Dr. Latané observes, was doubtless influenced not only by the immediate German violation of American rights on the seas and German conspiracies and activities within American territory, but also by the well-grounded apprehension of eventual German direct attack upon the United States and by the apparent necessity of the establishment of the peace of the world and the freedom of peoples against an irresponsible military autocracy (p. 186). In making the decision, the President "assumed an unparalleled moral leadership" by clearly formulating the issue to maintain democracy and the principle of the consent of the governed, positively and throughout the world, against the attacks of autocracy. At the peace conference, the author declares, America by her unselfish aims and with her cloistered virtue gone "will be in a position to shape the destinies of the world" (p. 208).

Dr. Latané has performed a useful service by placing in convenient form this interesting narrative of the evolution of the fundamental principles and complicated questions of foreign policy, which should facilitate the study of the subject and furnish to Americans an opportunity to obtain a wider knowledge of reliable facts—a knowledge which is required to reduce the necessity of secret diplomacy in a democracy. His volume deserves to be widely read.

J. M. CALLAHAN.

*A World Court in the Light of the United States Supreme Court.* By Thomas Willing Balch. Philadelphia: Allen, Lane & Scott. 1918. pp. 165.

In this interesting volume the author has given us not only an instructive review of the part the Supreme Court of the United States has played in settling serious disputes and preventing wars among the States of this Union, but has also presented a thoughtful and lucid

analysis of the true and the false analogies that may be drawn between the successful operation of that great court and the doubtful success of a world court organized to perform the same beneficent function as between the independent nations.

So far as mere legal or juridical questions are concerned he entertains no doubt that a world court would be competent to adjudicate them, and that there is little future danger of great wars resulting from such causes. "Legal" questions he defines as those which do not involve profound policies of self-preservation or the "vital interests" of a nation.

But he argues forcefully that the mere establishment of such a court would not suffice to prevent wars between nations arising from "political" disputes involving vital questions of their self-preservation or welfare. In these respects his hopes for future peace are based on the slow and gradual elimination of these causes of war through international legislation or mutual agreements of the nations, through an increasing popular hatred of war, and through increased powers of conciliation as well as of legislation conferred upon the International Conference at The Hague.

If, however, a world court cannot be expected to attain greater results in the security of permanent peace than the rather moderate ones above mentioned, why, it may be reasonably asked, has our Supreme Court succeeded so admirably in the peaceable settlement of the numerous disputes that have in the course of more than a century arisen between the sovereign states composing the United States?

Our author attributes this to two principal causes or influences. He is emphatic in his postulate that it is due, in the first place, to the pressure of the outside world reacting upon the States of the Union, which has forced them from motives of self-preservation and dread of attack to stand together and exert their united force to compel two disputant states to keep the peace and to accept judicial determinations of their disputes. On the other hand, in case of a court established by the united assent of all nations to secure general peace, there is no force *outside of the world* to drive the peoples of the earth to remain united in order to avoid war among themselves. But, to quote the author: "It should not be forgotten that there is *within* the Nations of the world themselves a force driving toward peace. This force arises from the fact that the destruction of life and wealth wrought by modern war as well as the destruction of wealth caused by the prepar-

ation in times of peace for war is so tremendous that immense suffering both immediate and for the future are thereby inflicted upon the inhabitants of the belligerent Nations, and indirectly in many cases upon neutrals."

May it not be hoped that this subjective force, greatly enhanced by the present war, will ultimately prove as powerful as the dread of attack from without?

The second reason assigned for the difference in effectiveness between our Supreme Court and the contemplated international tribunal is that in our case the vital interests of our States are protected already otherwise than by the action of the court, while those of the Nations must depend upon the adjudications of the world court or else upon the strong arms of the Nations themselves, the latter being their main reliance.

If we ask why this difference in favor of our Supreme Court, the author replies:

"Because when two States of the Union appear at its bar as litigants upon a question which is purely a bone of contention between them, not only is the power of all the United States, *owing in part to the pressure of the outside world* [italics his], behind the court to enforce its judgment, but also the future safety and existence of neither state is really endangered by the decision. The individual States of the Union are not exposed to be divided up and annexed in parcels or *in toto* to some of the other States, as is the case with members of the family of Nations.

"This immunity from dismemberment and absorption of one member state by another . . . is due in part to the need of all the forty-eight States . . . to remain united and live in peace together in order to afford a united and strong front for mutual protection against the other nations of the world . . . and in part also to the fact that within all the bounds of the United States there is entire freedom of trade and migration, while between the members of the family of nations there is restriction of trade and some restriction of migration."

If this be a complete analysis of the reasons for the difference, then the nations of the world, if they would have peace, must address themselves to the task of securing freedom of trade and migration amongst themselves and of finding a substitute for the need of "a united and strong front for mutual protection against other nations of the

world;" and when we remember that in an association of all the nations to secure permanent peace among themselves the only guarantee of it would be found in the maintenance of the association and the ready and prompt performance by each member Nation of its obligations, and recall the growing hatred of war alluded to by the author, it might be possible to place the world court on the same plane as our own Supreme Court.

But is it quite just to say that the only reasons why our States have no "vital interests" to protect against each other are those above mentioned? These certainly have their weight, but so also have those other provisions of our Constitution which declare that no State shall acquire the territory of another without the consent of the States concerned as well as of the Congress; that no State shall mistreat the citizens of another, but that the citizens of each shall have all the rights, privileges and immunities of citizens in the several States; that no State shall enter into alliances or confederations, or make any compact or agreement with another without the consent of Congress; that no State shall keep troops (save militia) or ships of war or declare war save when invaded; and—by no means least—that trade and commerce between the States and with foreign countries shall not only be free from restrictions laid by the States individually but shall be controlled by them all jointly through the Congress and through the treaty-making power.

Do not these constitutional provisions, taken together, lift our States individually out of the murky atmosphere of "political" disputes and elevate them to the purer and rarer atmosphere of the "legal" dispute, always capable of settlement by judicial decision? Are they not thereby deprived of the power and opportunity of exercising "political" powers, the prolific breeders of "political" disputes involving the "vital interests" which cannot be adjudicated?

The attainment of this desirable consummation by our States involved the total surrender or the grant to all the States united of some sovereign rights by each of the States, but only of those which were susceptible of being used to the detriment of their sister States in the Union; and while, as the author points out, since the adoption of the Constitution these surrenders or grants of powers have been more and more extended in consequence of the war of 1861 and of amendments and departmental interpretations of the Constitution, the fact remains that, even under that instrument as originally adopted, the States in-

dividually (though not in groups, as the events of 1861 attest) had very effectually preserved themselves and each other from interstate wars.

The thirteen original States were almost as proud of and devoted to their sovereignty and independence as is the proudest state in Europe, and yet they entered into a league which, through the surrender of certain war-breeding powers, enabled them not only to unite against outside foes but to prevent in the main internecine wars among themselves. May we not hope, despite the author's doubts, that the nations possess enough of constructive imagination to lift them to like heights of statecraft!

RALEIGH C. MINOR.

*German Imperialism and International Law.* By Jacques Marquis de Dampierre. New York: Charles Scribner's Sons. 1917. pp. viii, 277.

Copious quotations from the books of many of Germany's own writers, and from the archives of the French Government, constitute the source and basis of the indictment drawn in this book against the German imperialistic method of conducting war. The restrained and serious style in which the indictment is drawn gives their true value to the facts which are recorded. There can be no doubt as to the verdict of *guilty* which any fair-minded jury would be obliged to bring in against the accused.

About one-half of the book is devoted to the all too familiar and revolting story of the excesses committed by the German armies alike in victory and defeat. It proves, convincingly and abundantly, that the ancient military maxims, "to the victors belong the spoils" and "woe to the vanquished," have been acted upon by the German soldiers in this war with a scientific efficiency and universality unrivalled in any previous one within civilized times. In this respect, as in many others; "all precedents have been broken."

The chief interest and value of the book lies, however, in the author's attempt to explain the spoliation and terror caused by Germany's armies by referring them to Germany's imperialistic philosophy. In the course of his narrative there crop out every little while other causes or pretexts which will doubtless be exploited in detail by



Germany's future apologists. Among these may be mentioned, first, the *argumentum ad hominem*, especially with reference to Great Britain's methods in warfare. Maximilian Harden, for example, quotes with approval the dictum of Cecil Rhodes in regard to the Boer War: "This war is just because it serves my nation, because it increases the power of my country." Tannenberg, again, justifies Germany's treatment of private property on land by declaring that "Great Britain regards it as her special right to recognize no private property in maritime war. As an equally Germanic power, let us accept her point of view, and transport it into the domain which belongs to us—continental war." This *tu quoque* argument is applied, also, to Germany's continental neighbors who are accused of having treated German territories, during the Thirty Years and the Napoleonic wars, "as if they were goods without an owner."

Again, the glamor with which poets intoxicated by one thing or another have gilded, in the literature of every people, the "Berserker rage" displayed in primitive battles, is claimed by Germany's apologists for the *furor teutonicus* which has been so much in evidence during the present war.

The belief, cherished by Germany's masses and the mass of Germany's soldiers, that the true "Belgian atrocities" were those treacherously committed by a ferocious civilian populace upon German troops disposed to observe the laws of civilized warfare, is also made much of by the counsel for the defense.

But our author evidently considers these outcroppings as prevarications, exaggerations, or irrelevancies, and devotes the first half of his book to his thesis that violence is a vital element in Germany's political conceptions and that German imperialism is necessarily at war with international law. He admits that "the recruiting of modern armies from the whole mass of the nation always involves the risk of introducing into the army degenerates and feebleminded individuals, slaves of impulse, who, under the exceptional circumstances of the conflict, may be momentarily transformed into criminals." He accordingly refrains from indicting the whole German army for crimes committed by portions of it, as he would refuse to indict the whole German people or any people for scandalous crimes committed among them in time of peace.

On the other hand, he does fix responsibility, for the brutal attacks on property and persons, directly upon the military authorities who

ordered them, expressly approved them, or failed to punish them; and indirectly, but fundamentally, upon the militaristic imperialism which sent forth officers and men upon its mission. Such attacks, he contends, "far from constituting criminal exceptions, infractions (individual and collective) of the established discipline, are imputable to that discipline itself, and consequently to the system of government, to the whole social and moral creed, of which that discipline is the expression, the consequence, and the support."

The ultra-Teutonic conceptions of aggressive war as a capitalistic enterprise, a political duty, a biological necessity, etc., have become familiar to all the world in recent years, and the author of this book attempts, not so much to restate them, as to point out the proofs which German intellectuals have fabricated for them, and to illustrate their concrete results when embodied in actual war.

The moral of this, as of all other versions of the sordid story, is obviously that men must get rid of the whole *system* of war, for any nation is liable to pervert even its most chivalrous ideals to base and brutal uses; and, as the best means of achieving this great task, that they must replace autocracy by democracy, and nationalistic imperialism by international organization and cooperation.

WM. I. HULL.

*European Treaties Bearing on the History of the United States and its Dependencies to 1648.* Edited by Frances Gardiner Davenport. Washington: The Carnegie Institution. 1917. pp. vi, 387.

As defined by the editor, the purpose of the volume is to furnish "all treaties, or parts of treaties, that bear upon the history of the present territory of the United States, or of its outlying possessions. Some drafts of treaties, and the papal bulls which formed a basis for the claims of Portugal or Spain to the aforesaid territory, are also included." Four documents in this collection are now printed for the first time, and all others have been more carefully collated with the originals or authentic texts than in previous editions. A brief general introduction describes the character and inter-relation of the documents as a whole, while a more detailed introduction prefixed to each document adequately sets forth its individual background and bearing. A bibliography accompanies each document; and the documents themselves are printed in the original languages, with translations and ex-

haustive notes. Nearly two hundred pages, more than half the volume, are taken up with the relations of Portugal and Spain (and the Papacy) before the entrance of a third power. The relations of these two and of France, England, the Netherlands, and Denmark fill the rest of the book.

The first half of the volume, as the direct background of American diplomatic history, is much more valuable than the second, which, in general, possesses rather minute importance for American history, and is more or less incidental to the larger diplomacy of Europe. The Department of Historical Research plans to continue the work thus begun, and a volume including similar materials from 1648 to 1713 is in preparation. An inconsistency is noted between pages 1 and 27 in ascribing to both Nicholas V and Calixtus III the authorship of document 2.

EUGENE C. BARKER.

## PERIODICAL LITERATURE OF INTERNATIONAL LAW

[For table of abbreviations, see p. 102.]

- Africa.* Central (A) African Confederation. By Africanus. *Journal of the African Society*, 17: 276. July.
- . International (The) factor in the African settlement. Noel Buxton. *Contemporary R.*, 114: 513.
- Agents.* Agents et archives diplomatiques. La legation de Russie à Berne et ses archives. O. Nippold. *Clunet*, 45: 1134.
- . Immunité diplomatique. *Clunet*, 45: 1183.
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KATHRYN SELLERS.

## THE PEACE CONFERENCE OF PARIS, 1919

### ITS ORGANIZATION AND METHOD OF WORK

ON January 18, 1919, the forty-eighth anniversary of the proclamation of the German Empire at Versailles after the invasion of France in 1870-1871, there assembled in the Ministry of Foreign Affairs at Paris a meeting of the representatives of the Allied and Associated belligerent Powers, as well as the Powers which had broken off diplomatic relations, to decide upon the terms of peace to be offered to Germany and her allies.

Emulating Bismarck, who used the emasculated telegram of Ems as the pretext of waging a war of conquest upon France,<sup>1</sup> William II and his General Staff seized upon the rupture between Austria-Hungary and Serbia growing out of the assassination of the Austrian Crown Prince at Serajevo in June, 1914, as the pretext for launching Germany upon a carefully prepared program of world domination. Fearful lest delay might result in the loss of the opportunity for which she had deliberately planned and anxiously awaited, within a week after Austria-Hungary declared war on Serbia on July 28, 1914, Germany had declared war on Russia and France and had shamelessly violated the neutrality of Belgium which she had solemnly undertaken to respect. Great Britain, for self-protection and in response to treaty obligations, immediately entered the war against Germany, and was successively followed from time to time, as Germany evinced her disregard of international law, the laws of war and the dictates of humanity, by all the other large Powers and many of the smaller ones whose interests were jeopardized or rights infringed upon by Germany's increasingly reckless and ruthless conduct.

Of the forty-eight recognized governments in 1914, before hos-

<sup>1</sup> See translation from Bismarck, *Gedanken und Erinnerungen*, in *A Survey of International Relations between the United States and Germany*, by J. B. Scott. New York: Oxford University Press. 1917, pp. 359-362.

tilities ceased twenty-three were at war with Germany and her allies; four had severed diplomatic relations with them; two had joined Germany and Austria-Hungary, and seventeen (including Luxemburg) had remained neutral.

After over four years of the most costly war in human life and treasure that the world has ever witnessed, the first visible break in the lines of the opposing belligerents came when Bulgaria surrendered under an armistice on September 29, 1918.<sup>2</sup> Turkey followed suit on October 31, 1918,<sup>3</sup> and Austria-Hungary did likewise on November 4, 1918.<sup>4</sup> These desertions from the "unholy alliance," coincident with the continued military successes of the Allies on Germany's western front, produced immediate results in the latter country. A mutiny, starting at Kiel on November 5th, quickly developed into a Socialist revolution throughout the Empire. On November 9th, Kaiser William fled to Holland, where he signed a formal act of abdication on November 28th.<sup>5</sup> On November 11th representatives of a new "People's Government" in Germany signed an armistice with the Allies pending the conclusion of peace, under the provisions of which Germany was made impotent to restore her shattered military power in order to oppose the terms of peace that might be decided upon by her former victims and present conquerors, to right, as far as possible, the many wrongs she has committed, compensate the numerous injuries she has inflicted, repair the inestimable damage she has done, and give bond, with ample securities, for her good conduct in the future.

In the words of President Poincaré of France, in welcoming the delegates at the opening of the preliminary peace conference at Paris, the German Empire, born in injustice, and consecrated by the theft

<sup>2</sup> For a summary of the terms of the armistice with Bulgaria, see the *New York Times*, October 18, 1918.

<sup>3</sup> For the text of the armistice with Turkey, see Pamphlet No. 133 of the American Association for International Conciliation, New York.

<sup>4</sup> For the official text of the armistice with Austria, see SUPPLEMENT to this JOURNAL, p. 80.

<sup>5</sup> See a *Documentary History of the German Revolution* in Pamphlet No. 137 of the American Association for International Conciliation.

<sup>6</sup> For the official text of the armistice with Germany, see SUPPLEMENT to this JOURNAL, p. 97.

of two French provinces, was vitiated from its origin, and has ended in opprobrium.

The proposals for peace which led up to the cessation of hostilities under the armistice with Germany were initiated by that government a week after the defection of Bulgaria. On October 6, 1918, the German Government requested the President of the United States to take steps for the restoration of peace and to invite all the belligerents to delegate plenipotentiaries for the purpose of taking up negotiations upon the basis of the program laid down by President Wilson in his message to Congress on January 8, 1918, and in his subsequent pronouncements, particularly in his address of September 27, 1918. President Wilson's program of January 8, 1918, since commonly referred to as the "Fourteen Points," was as follows:

I. Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind, but diplomacy shall proceed always frankly and in the public view.

II. Absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants.

III. The removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance.

IV. Adequate guarantees given and taken that national armaments will be reduced to the lowest point consistent with domestic safety.

V. A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.

VI. The evacuation of all Russian territory, and such a settlement of all questions affecting Russia as will secure the best and freest cooperation of the other nations in the world, in obtaining for her an unhampered and unembarrassed opportunity for the independent determination of her own political development and national

policy and assure her of a sincere welcome into the society of free nations under institutions of her own choosing; and, more than a welcome, assistance also of every kind that she may need and may herself desire. The treatment accorded Russia by her sister nations in the months to come will be the acid test of their good-will, of their comprehension of her needs as distinguished from their own interests, and of their intelligent and unselfish sympathy.

VII. Belgium, the whole world will agree, must be evacuated and restored, without any attempt to limit the sovereignty which she enjoys in common with all other free nations. No other single act will serve as this will serve to restore confidence among the nations in the laws which they have themselves set and determined for the government of their relations with one another. Without this healing act the whole structure and validity of international law is forever impaired.

VIII. All French territory should be freed and the invaded portions restored, and the wrong done to France by Prussia in 1871 in the matter of Alsace-Lorraine, which has unsettled the peace of the world for nearly fifty years, should be righted, in order that peace may once more be made secure in the interest of all.

IX. A readjustment of the frontiers of Italy should be effected along clearly recognizable lines of nationality.

X. The peoples of Austria-Hungary, whose place among the nations we wish to see safeguarded and assured, should be accorded the freest opportunity of autonomous development.

XI. Rumania, Serbia, and Montenegro should be evacuated; occupied territories restored; Serbia accorded free and secure access to the sea; and the relations of the several Balkan States to one another determined by friendly counsel along historically established lines of allegiance and nationality; and international guarantees of the political and economic independence and territorial integrity of the several Balkan States should be entered into.

XII. The Turkish portions of the present Ottoman Empire should be assured a secure sovereignty, but the other nationalities which are now under Turkish rule should be assured an undoubted security of life and an absolutely unmolested opportunity of autonomous development, and the Dardanelles should be permanently opened as a free passage to the ships and commerce of all nations under international guarantees.

XIII. An independent Polish State should be erected which

should include the territories inhabited by indisputably Polish populations, which should be assured a free and secure access to the sea, and whose political and economic independence and territorial integrity should be guaranteed by international covenant.

XIV. A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike.<sup>7</sup>

In the correspondence which followed between President Wilson and the German Government, the latter stated that it "accepted the terms laid down by President Wilson in his address of January the eighth and in his subsequent addresses as the foundations of a permanent peace of justice," and that "consequently, its object in entering into discussions would be only to agree upon practical details of the application of these terms."<sup>8</sup> After receiving assurances as to the right of the then German Government to speak for the German people and the agreement of the Central Powers immediately to withdraw their forces everywhere from invaded territory, the President transmitted his correspondence with the German authorities to the governments with which the United States is associated, with the suggestion that, if those governments were disposed to effect peace upon the terms and principles indicated, the military advisers of the Associated Governments submit the terms of such an armistice as would fully protect the interests of the peoples involved and insure to the Associated Governments the unrestricted power to safeguard and enforce the details of the peace to which the German Government had agreed. After giving careful consideration to the correspondence, the Allied Governments declared their willingness to make peace with Germany on the terms of peace laid down in the President's address to Congress of January, 1918, and the principles of settlement enunciated in his subsequent addresses, with the following qualifications:

Clause two, relating to what is usually described as the freedom

<sup>7</sup> *President Wilson's Foreign Policy—Messages, Addresses, Papers.* Edited by J. B. Scott. New York: Oxford University Press. 1918, pp. 359-362.

<sup>8</sup> Note of October 14, 1918, together with text of this entire correspondence, printed in SUPPLEMENT to this JOURNAL, p. 85 *et seq.*



of the seas, is open to various interpretations, some of which they could not accept. They must, therefore, reserve to themselves complete freedom on this subject when they enter the peace conference.

Further, in the conditions of peace, laid down in his address to Congress of January 8, 1918, the President declared that invaded territories must be restored as well as evacuated and freed. The Allied Governments feel that no doubt ought to be allowed to exist as to what this provision implies: By it they understand that compensation will be made by Germany for all damage done to the civilian population of the Allies and their property by the aggression of Germany by land, by sea, and from the air.

The President transmitted this acceptance, which was in the form of a memorandum, to Germany on November 5, 1918, stating that he was in agreement with the interpretation set forth in the paragraphs above quoted. At the same time he notified the German Government that Marshal Foch had been authorized by the Government of the United States and the Allied Governments to receive properly accredited representatives of the German Government and to communicate to them the terms of an armistice. Six days later the armistice was signed. Its principal stipulations required Germany immediately to evacuate all invaded countries, to repatriate the inhabitants of such countries, to evacuate the countries on the left bank of the Rhine, to repatriate, without reciprocity, all American and Allied prisoners of war, to abandon the treaties of Eucarest and Brest-Litovsk and supplementary treaties, and to surrender a large amount of military equipment and material and the greater part of the German navy, including airships and submarines, and to immobilize the balance. It further stipulated for the continuance of the Allied blockade of Germany. The armistice was made for thirty days, and was renewed in December, January and February, with certain modifications insisted upon by the Allies to insure the observance of the original terms and maintain the military *status quo*.

With the view of laying down the conditions of peace to be offered to Germany and her allies, the five Great Powers, namely, the United States of America, the British Empire, France, Italy, and Japan, summoned the Preliminary Peace Conference, which met at Paris on

January 18th, last, to which were invited all the other Allied and Associated belligerent Powers, as well as the Powers which had broken off diplomatic relations with the enemy Powers.

The rules of the Conference, drawn up by the representatives of the five Great Powers in advance of its opening, divided the Allied and Associated Governments into three groups for purposes of representation and participation in the conference. The first group comprised the belligerent Powers with general interests, namely, the United States of America, the British Empire, France, Italy, and Japan, whose delegates were entitled to attend all sessions of the Conference and commissions. The second group included the belligerent Powers with special interests, namely, Belgium, Brazil, the British Dominions and India, China, Cuba, Greece, Guatemala, Hayti, the Hedjaz, Honduras, Liberia, Nicaragua, Panama, Poland, Portugal, Roumania, Serbia, Siam, and the Czecho-Slovak Republic, whose delegates are entitled to attend sessions at which questions concerning them are discussed. The third group was made up of Powers which have broken off diplomatic relations with the enemy Powers, namely, Bolivia, Ecuador, Peru, and Uruguay. The delegates of these Powers are likewise entitled to attend the sessions at which questions concerning them are discussed. Provision was made that neutral Powers and States in process of formation should, on being summoned by the Powers with general interests, be heard, either orally or in writing, at sessions devoted especially to the examination of questions in which they are directly concerned, and only in so far as those questions are concerned.

The number of delegates allowed to each of the foregoing Powers was as follows: Five each to the United States, the British Empire, France, Italy, and Japan; three each to Belgium, Brazil and Serbia; two each to Australia, Canada, China, Greece, the Hedjaz, India (including the native States), Poland, Portugal, Roumania, Siam, South Africa, and the Czecho-Slovak Republic; one each to Bolivia, Cuba, Ecuador, Guatemala, Hayti, Honduras, Liberia, New Zealand, Nicaragua, Panama, Peru, and Uruguay, making seventy in all. Montenegro was allowed one delegate, but the manner of his appointment was not to be decided until the political situation of that coun-

try became clear. It was further provided that the conditions governing the representation of Russia should be settled by the Conference when Russian affairs come up for discussion.

A by no means smooth problem which the representatives of the five Great Powers were called upon to decide in advance of the Conference was the question of publicity of the proceedings. The opening clause in President Wilson's "Fourteen Points" provided for "Open covenants of peace, openly arrived at." Press correspondents from all over the world flocked to Paris by the hundreds. The Government of the United States had provided a transport to accommodate the large delegation of American newspaper representatives. These men naturally took a keen interest in the provisions which would be made for enabling them to report to their respective publics the happenings at the Conference. When the rules of the Conference, announced a few days before its opening, provided merely that "Publicity shall be given to the proceedings by means of official *communiqués* prepared by the Secretariat and made public," the representatives of the press were greatly disappointed. They held a meeting and appointed a special committee which, on January 16th, unanimously adopted resolutions requesting that the official *communiqués* be as complete as possible, that, in addition, full summaries of each day's proceedings be issued, that responsible journalists have free intercourse with the delegates, and that the censorship be abolished in all Allied countries. A further resolution was adopted, from which the French press representatives dissented, that there should be direct representation of the press at the sittings of the Conference.

These resolutions were forwarded to the Conference, which, on the following day, replied that, while the representatives of the Allied and Associated Powers were anxious that the public, through the press, should have the fullest information compatible with safeguarding the supreme interest of all, which was that a just and honorable settlement should be arrived at with the minimum of delay so that the belligerents might demobilize their armies and return to the ways of peace, yet the conversations must be subject to the limitations necessarily imposed by the difficult and delicate nature of their object; that the proceedings of the Conference were not analogous to those

of a legislature but to those of a Cabinet, which are held in private in order that differences may be reconciled and agreement reached before the stage of publicity has begun; that to start the discussions with a public declaration by each delegation of its own national point of view would lead to premature public controversy, not only within the interested states, but between the interested nations, render infinitely more difficult the process of give and take, so essential to the negotiations, and hinder that unanimity of agreement which is vital to success; that premature publicity would interminably protract the proceedings by distracting the delegates from the business before the Conference, and that the public announcement of the conclusions as they were arrived at on specific points would lead to undue misapprehension, because it would not be possible to judge of the wisdom and justice of the peace settlement until it could be viewed as a whole. The announcement ended by stating that the following rule had been adopted with regard to the full conferences:

Representatives of the press shall be admitted to the meetings of the full Conference, but upon necessary occasions the deliberations of the Conference may be held in camera.

Representatives of the press were accordingly admitted to the opening session on January 18th and to the plenary sessions on January 25th and February 14th, but not admitted to the meetings of the representatives of the Great Powers or of the Commissions and Committees, the only record of whose transactions the public receives being in the form of official *communiqués* issued after each meeting.

The Preliminary Peace Conference was opened at three o'clock P.M. on January 18, 1919, at the French Ministry of Foreign Affairs under the Presidency of Mr. Raymond Poincaré, President of the French Republic, in the presence of the delegates of the following nations: United States of America, the British Empire, France, Italy, Japan, Belgium, Bolivia, Brazil, China, Cuba, Ecuador, Greece, the Hedjaz, Peru, Poland, Portugal, Roumania, Serbia, Siam, the Czecho-Slovak Republic, and Uruguay. Delegates of the following countries did not arrive in time to attend the opening session or the second plenary session on January 25th: Guatemala, Hayti, Honduras, Li-

beria, New Zealand, Nicaragua and Panama. Of the nations in existence when the war started in 1914, Russia and Montenegro were not represented because of the political conditions in those countries; but three new nations, erected as the result of the war, had delegates present, namely, the Hedjaz, Poland and the Czecho-Slovak Republic.

After the welcoming address of President Poincaré, he withdrew and the chair was taken temporarily by Mr. Clemenceau, President of the French Council of Ministers, in accordance with the rules of the Conference. The nomination of a permanent President was announced as the first order of business, and President Wilson proposed Mr. Clemenceau, whose nomination was seconded by Mr. Lloyd George of Great Britain and Baron Sonnino of Italy. There were no other nominations and Mr. Clemenceau was unanimously elected.

The Conference then authorized the designation of a Vice-President by each of the other Great Powers, and the following plenipotentiaries were named: Honorable Robert Lansing, United States of America; Rt. Hon. David Lloyd George, Great Britain; Mr. V. E. Orlando, Italy; Marquis Saioniji, Japan. •

The President of the Conference then proposed Mr. Dutasta, of France, for the office of Secretary General of the Conference, and the proposal was unanimously adopted. Secretaries to be selected by each of the other Great Powers were then proposed and authorized. A Committee on Credentials, composed of one representative from the Great Powers, and a Drafting Committee, similarly formed, were then proposed and accepted, the respective representatives to be chosen by each Power. The following members were appointed on these two committees:

*Committee on Credentials:*

- Hon. Henry White (United States of America).
- The Right Hon. Arthur Balfour (British Empire).
- Mr. Jules Cambon (France).
- Marquis Salvago Raggi (Italy).
- Mr. K. Matsui (Japan).

*Drafting Committee:*

Major James Brown Scott (Judge Advocate, United States of America).

Mr. Hurst, K.C., Counsellor of Embassy, Legal Adviser to the Foreign Office (British Empire).

Mr. Fromageot, Legal Adviser to the Ministry of Foreign Affairs (France).

Mr. Ricci-Busatti, Minister Plenipotentiary, Head of the Legal Department of the Ministry of Foreign Affairs (Italy).

Mr. H. Nagaoka, Counsellor of the Japanese Embassy at Paris (Japan).

These officers and committees constitute the Bureau of the Conference.

Mr. Clemenceau then made a brief speech in which he stated that the program of the conference had been laid down by President Wilson, and invited the delegates of all the Powers to submit memoranda on the three questions which had been placed upon the order of the day, namely, the responsibility of the authors of the war, the penalty for the crimes committed during the war, and international legislation on labor. He further invited the Powers with special interests to submit memoranda on all questions, territorial, financial or economic, which particularly interested them. The session then adjourned at 4:35 P.M.

Although nothing is said in the rules of the Conference regarding its official language or languages, the proceedings were conducted in both French and English, an interpreter following each speaker with a translation of his remarks.

The second plenary session of the Conference was held on January 25, 1919. The first business on the order of the day was the following draft resolution submitted by the Bureau, to provide for the appointment of a Commission on the League of Nations:

*Resolution Relative to the League of Nations*

The Conference, having considered the proposals for the creation of a League of Nations, resolves that—

1. It is essential to the maintenance of the world settlement, which the Associated Nations are now met to establish, that a League of

Nations be created to promote international coöperation, to insure the fulfilment of accepted international obligations, and to provide safeguards against war.

2. This League should be treated as an integral part of the general Treaty of Peace, and should be open to every civilized nation which can be relied on to promote its objects.

3. The members of the League should periodically meet in international conference, and should have a permanent organization and secretariat to carry on the business of the League in the intervals between the conferences.

The Conference therefore appoints a committee representative of the Associated Governments to work out the details of the constitution and functions of the League.

The discussion upon the resolution was opened by President Wilson, who stated that the Conference was solemnly obligated to make permanent arrangements to insure justice and maintain peace; that the United States had come into the war not to intervene in the politics of Europe or of Asia, but in the cause of justice and liberty for men of every kind and place, and that it could take no part in guaranteeing European settlements unless that guarantee involved the continuous superintendence of the peace of the world by the associated nations of the world; and that the representatives of the United States regarded the project for a League of Nations as the keystone of the whole peace program.

The resolution was seconded by Mr. Lloyd George of Great Britain, Mr. Orlando of Italy, Mr. Bourgeois of France, Mr. Lou of China, and Mr. Dmowski of Poland, after which it was unanimously adopted.

The Bureau also laid before the Conference, in accordance with the order of the day, the following draft resolutions providing for the appointment of commissions on reparation of damages, responsibility of the authors of the war and penalties, international labor legislation and international control of ports, waterways and railways:

*Resolution Relative to the Responsibility of the Authors of the War and the Enforcement of Penalties*

That a commission, composed of two representatives apiece from the five Great Powers and five representatives to be elected by the

other Powers, be appointed to inquire into and report upon the following:

1. The responsibility of the authors of the war.
2. The facts as to breaches of the laws and customs of war committed by the forces of the German Empire and their Allies, on land, on sea and in the air during the present war.
3. The degree of responsibility for these offenses attaching to particular members of the enemy forces, including members of the General Staffs and other individuals, however highly placed.
4. The constitution and procedure of a tribunal appropriate to the trial of these offenses.
5. Any other matters cognate or ancillary to the above which may arise in the course of the inquiry and which the commission finds it useful and relevant to take into consideration.

*Resolution Relative to Reparation for Damage*

That a commission be appointed with not more than three representatives apiece from each of the five Great Powers and not more than two representatives apiece from Belgium, Greece, Poland, Roumania and Serbia, to examine and report:

1. On the amount which the enemy countries ought to pay by way of reparation.
2. On what they are capable of paying; and
3. By what method, in what form and within what time payment should be made.

*Resolution on International Legislation on Labor*

That a commission, composed of two representatives apiece from the five Great Powers and five representatives to be elected by the other Powers represented at the Peace Conference, be appointed to inquire into the conditions of employment from the international aspect and to consider the international means necessary to secure common action on matters affecting conditions of employment, and to recommend the form of a permanent agency to continue such inquiry and consideration in coöperation with and under the direction of the League of Nations.

*Resolution Relative to International Control of Ports, Waterways and Railways*

That a commission, composed of two representatives apiece from the five Great Powers and five representatives to be elected by the other Powers, be appointed to inquire into and report on:

International control of ports, waterways, and railways.



With the exception of the Commission on Reparation of Damages, all of the resolutions provided that the commissions should be composed of two representatives from each of the five Great Powers and five representatives to be elected by the smaller nations. After the adoption of the resolution upon the League of Nations, Mr. Hymans, a delegate of Belgium, questioned the allotment of only five representatives on these commissions to the eighteen Powers termed "Powers with special interests," and he requested that Belgium be given two representatives on the Commission on the League of Nations, two on the Commission on International Labor Legislation, and one each on the Commissions on International Control of Ports, Waterways and Railways, and Responsibility of the Authors of the War and Penalties.

He was followed by Mr. Calogeras, of Brazil, who questioned the right of the Great Powers to decide the matter, and requested that Brazil be represented on the Commission on the League of Nations, the Commission on the International Control of Railways and Ports, and the Commission on Reparation of Damages.

Sir Robert Borden, of Canada, sympathized with the point of view of the smaller nations and thought that the matter of representation on the commissions should be decided by the full Conference.

Mr. Trumbitch, of Serbia, made the same claims for representation for his country as Belgium.

Mr. Venizelos requested that Greece be given representation on the Commission on Responsibility of the Authors of the War and on the Commission for the International Control of Ports.

Count Penha-Garcia, of Portugal, likened the procedure to be followed by the Conference with reference to the representation of the various Powers on the commissions as a forecast of their relations in the proposed League of Nations, and he appealed for representation of all the Powers with special interests on commissions which deal with questions in which they are vitally interested. Specifically he requested that Portugal be accorded representation on the Commission on Reparation.

Mr. Benes requested that representatives of the Czecho-Slovak Republic be placed upon the Commission on Reparation for Damages,

the Commission on the International Control of Waterways and Railways, and the Commission on the League of Nations.

Mr. Bratiano, a delegate of Roumania, requested the representation of his country upon the Commission on the League of Nations and the Commission on the International Control of Waterways.

Mr. Lou Tseng-Tsiang, a delegate of China, claimed, on the principle of equality of sovereign states, representation for China upon the Commission on the League of Nations, the Commission on International Labor Legislation and the Commission on International Control of Ports, Railways and Waterways. He suggested that the Conference follow in this respect the procedure of the Hague Conferences regarding the formation of committees, which established a panel of delegates from which each delegation interested in any particular questions could select members of the commissions.

Mr. Dmowski associated Poland with the observations made by the representatives of the other Powers, and suggested that each Power should be entitled to put forward a definite claim for a certain number of delegates on each of the commissions and that the distribution among them should be decided by a central committee which would be placed in charge of all the arrangements.

After the delegates had concluded their remarks, Mr. Clemenceau replied to the effect that the five Great Powers would have been justified, on account of their more important contributions and sacrifices in the war, to consult only themselves in the peace settlement, but, actuated by the idea of the League of Nations, they had invited the coöperation of all the nations interested in the settlement. He stated that to satisfy every one, each Power would have to be represented on each commission, which would make the commissions too large to arrive at conclusions; that the procedure decided upon by the Bureau was devised to accomplish immediate and useful work, and that, although each Power could not be represented on every commission, it had the right to be fully heard by any commission and later before the full Conference when the commissions' reports were submitted. He suggested that the draft resolutions be voted so that the various commissions could start to work, with the reservation of amending the provision concerning representation. The discussion ended by

the agreement of the Powers with special interests to meet on the following Monday, January 27th, to elect the representatives indicated in the resolutions but reserving the right later to claim larger representation.

The representatives of the Powers with special interests accordingly met on January 27th, 1919, at three o'clock, at the French Foreign Office, under the Presidency of M. Jules Cambon, French delegate, and elected representatives as follows upon the four commissions:

Commission on the League of Nations: one representative each for Belgium, Brazil, China, Serbia and Portugal.

Commission on Responsibility of the Authors of the War: one representative each for Belgium, Serbia, Roumania, Greece and Poland.

Commission on International Legislation on Labor: two representatives for Belgium and one representative each for Cuba, Poland and the Czecho-Slovak Republic.

Commission on International Control of Ports, Waterways and Railways: one representative each for Belgium, China, Greece, Serbia and Uruguay.

The reservations of the smaller nations upon the question of increased representation were not wholly ineffective in securing them additional delegates on some of the Commissions. At the first meeting of the Commission on the International Control of Ports, Waterways and Railways, on February 3d, the official *communiqué* states that "the Peace Conference reported that a request had been received to increase the representation of the minor Powers by including representatives nominated by Roumania, Czecho-Slovakia, Portugal and Poland, and that it had been decided to leave the question to the decision of the Commission. It has unanimously decided to include these representatives." The question was similarly brought before the Commission on the League of Nations at its meeting on February 6th and discussed. At the meeting on the following day, the official *communiqué* states that it was unanimously agreed that the representatives of Czecho-Slovakia, Greece, Poland, and Roumania should be associated with the Commission. The additions to these Commissions gave them a total membership of nineteen, ten repre-

senting the five Great Powers, and nine, or a bare minority, representing the smaller Powers.

While the full meetings of the delegates of all the Powers represented are commonly referred to as the Conference, the business transacted at them is of relative unimportance, and only four plenary sessions were held from the opening of the Preliminary Conference on January 18th until the meeting of the actual Peace Conference with the enemy delegates on May 7th, the fourth anniversary of the sinking of the *Lusitania*. Their principal function, after the election of the Bureau selected by the Great Powers, is to receive reports from the Commissions and go through the formality of ratifying them.

The real working body of the Conference is made up of the representatives of the five Great Powers which, under the regulations, are alone entitled to attend all the sessions of the Conference. Their meetings, therefore, are just as much sessions of the Peace Conference as the plenary sessions of all the delegates, and they apparently do not regard their actions as subject to review or confirmation by the larger body, for none of their decisions are submitted to the full body for consideration or action. Only the work of the Commissions authorized by resolutions of all the delegates is submitted to the plenary sessions.

The representatives of the Great Powers held a number of meetings during the week preceding the formal opening of the Conference, at which they decided upon the countries which would be admitted to the Conference, the number of representatives to be allowed to each, the Bureau to be organized to carry on the administrative work of the Conference, and the rules of the Conference itself. Their decisions on these matters were submitted to the full Conference for its guidance, not for its approval.

These meetings of the representatives of the Great Powers are commonly described in the official *communiqués* as "meetings of the President of the United States, the Prime Ministers and Foreign Ministers of the Allied and Associated Powers and the Japanese representatives." Ordinarily two representatives from each Power were in attendance and they became popularly known as "The Council of Ten." Later this number was seemingly regarded as too large for

the expeditious transaction of business, and the representation was cut in half, thus leading to the popular designation of "The Council of Five." Then it was found unnecessary to have the representative of Japan in attendance except when Japanese interests were involved, and the number of representatives was reduced to four, and the body became popularly known as "The Council of Four." But, while these popular appellations refer to the meetings of the representatives of the Great Powers as a council, the meetings are, nevertheless, as above stated, under the rules of the Conference, equally as valid and authoritative meetings of the Peace Conference as are the plenary sessions of the seventy delegates of all the Powers. In fact, the so-called Council of Great Powers is the only body of the Conference continuously in session.

From the formal opening of the full Conference on January 18th until its third meeting on February 14th, with which this narrative ends, the representatives of the Great Powers met on twenty days, sometimes holding two sessions a day. The meetings were not open to the public and information concerning their transactions was supplied to the press in official *communiqués* averaging in length about two hundred words and containing a short summary of the persons present and the matters discussed.

After the inaugural session, on January 18th, the representatives of the Great Powers first devoted their meetings to the consideration of the situation in Russia. On January 22d they approved the following proposal of President Wilson upon that subject:

The single object the representatives of the Associated Powers have had in mind in their discussions of the course they should pursue with regard to Russia has been to help the Russian people, not to hinder them, or to interfere in any manner with their right to settle their own affairs in their own way. They regard the Russian people as their friends, not their enemies, and are willing to help them in any way they are willing to be helped. It is clear to them that the troubles and distresses of the Russian people will steadily increase, hunger and privation of every kind become more and more acute, more and more widespread, and more and more impossible to relieve, unless order is restored, and normal conditions of labor, trade, and transportation once more created, and they are seeking some way in which to assist the Russian people to establish order.

They recognize the absolute right of the Russian people to direct their own affairs without dictation or direction of any kind from outside. They do not wish to exploit, or make use of Russia in any way. They recognize the revolution without reservation and will in no way, and in no circumstances, aid or give countenance to any attempt at a counter-revolution. It is not their wish or purpose to favor or assist any one of the organized groups now contending for the leadership and guidance of Russia as against the others. Their sole and sincere purpose is to do what they can to bring Russia peace and an opportunity to find her way out of her present troubles.

The Associated Powers are now engaged in the solemn and responsible work of establishing the peace of Europe, and of the world, and they are keenly alive to the fact that Europe and the world can not be at peace if Russia is not. They recognize and accept it as their duty, therefore, to serve Russia in this great matter as generously, as unselfishly, as thoughtfully, and ungrudgingly as they would serve every other friend and ally. And they are ready to render this service in the way that is most acceptable to the Russian people.

In this spirit and with this purpose, they have taken the following action: They invite every organized group that is now exercising or attempting to exercise political authority or military control anywhere in Siberia, or within the boundaries of European Russia as they stood before the war just concluded (except in Finland), to send representatives, not exceeding three representatives for each group, to the Prince's Islands, Sea of Marmora, where they will be met by representatives of the Associated Powers, provided in the meantime there is a truce of arms amongst the parties invited, and that all armed forces anywhere sent or directed against any people or territory outside the boundaries of European Russia as they stood before the war, or against Finland, or against any people or territory whose autonomous action is in contemplation in the fourteen articles upon which the present negotiations are based, shall be meanwhile withdrawn, and aggressive military action cease. These representatives are invited to confer with the representatives of the Associated Powers in the freest and frankest way, with a view to ascertaining the wishes of all sections of the Russian people, and bringing about, if possible, some understanding and agreement by which Russia may work out her own purposes and happy coöperative relations be established between her people and the other peoples of the world.

A prompt reply to this invitation is requested. Every facility for the journey of the representatives, including transport across the Black Sea, will be given by the Allies, and all the parties concerned are expected to give the same facilities. The representatives will be expected at the place appointed by the fifteenth of February, 1919.

The proposal will be sent to-night by wireless to the interested parties.

The political situation in Poland also received the early attention of the Great Powers. On January 22d, they decided to send to Poland a commission composed of two delegates, one civil and the other military, of the United States, Great Britain, France and Italy. The following members were appointed:

*Commission on the Mission to Poland:*

United States of America: General Kernan, Dr. Lord.

British Empire: Sir Esme Howard, General Carton de Wiart.

France: M. Noulens, General Niessel.

Italy: M. Montagne, General Romei.

Territorial questions next received attention. On January 23d the Great Powers considered the procedure to be adopted with regard to these questions, but before taking them up they thought it necessary to deal with the unfortunate armed conflicts then being waged in different parts of Europe over disputed pieces of territory, the title to which the Conference hopes to define. They, therefore, on January 24th, issued the following communication to the conflicting parties, which it transmitted by wireless to all parts of the world:

The governments now associated in conference to effect a lasting peace among the nations are deeply disturbed by the news which comes to them of the many instances in which armed force is being made use of, in many parts of Europe and the East, to gain possession of territory, the rightful claim to which the Peace Conference is to be asked to determine. They deem it their duty to utter a solemn warning that possession gained by force will seriously prejudice the claims of those who use such means. It will create the presumption that those who employ force doubt the justice and validity of their claim and purpose to substitute possession for proof of right and set up sovereignty by coercion rather than by racial or national preference and natural historical association. They thus put a cloud upon every evidence of title they may afterward allege and indicate their distrust of the Conference itself. Nothing but the most unfortunate results can ensue. If they expect justice, they must refrain from force and place their claims in unclouded good faith in the hands of the Conference of Peace.

The disposition of the German colonies in the Far East, Africa and the Pacific occupied the meetings of the Great Powers on January 24th, 27th, 28th and 30th, at which representatives of Canada, Australia, South Africa, New Zealand, China, Italy, Japan, France and Belgium were heard concerning the particular interests of their respective countries in the disposition of these colonies. The Powers also considered the application of the principles of the League of Nations in relation to the colonies. After the meeting on January 30th, it was announced that satisfactory provisional arrangements had been reached for dealing with the German colonies and the occupied territory in Turkey-in-Asia.

The Great Powers then passed to the consideration of the territorial questions in Continental Europe.

On January 29th, the dispute between Poland and Czecho-Slovakia over the industrial district of Teschen was presented by the delegates of those two countries, and on January 31st it was decided to send an allied commission to Teschen to assure the peaceful exploitation of the district pending the settlement of the question by the Conference. A *modus vivendi* was signed on February 3d by the representatives of Poland and Czecho-Slovakia, the President of the United States and the Prime Ministers of Great Britain, Italy and France. This document recognized the right of the Allied Commission to supervise the exploitation of the district so as to avoid any conflict between the Czechs and Poles and to inquire into the basis upon which the Peace Conference may form its decision in definitively fixing the respective frontiers.<sup>9</sup> The Commission of Control was constituted as follows:

*Commission on Control for Teschen:*

United States of America: Mr. Marcus A. Coolidge.  
British Empire: Colonel Coulsor.  
France: M. Grenard.  
Italy: M. Bitissi.

The claims of Roumania and Serbia in the Banat of Temesvar were presented to the conference of the Great Powers on January

<sup>9</sup> The text of the *modus vivendi* is printed herein, *infra*, p. 319.



31st. On February 1st a detailed statement of Roumanian claims was heard, and the following Commission appointed to examine them:

*Commission for the Study of Roumanian Territorial Claims:*

United States of America: Dr. Day, Dr. Seymour.

British Empire: Sir Eyre Crowe, Mr. Leeper.

France: M. Tardieu, M. Larouche.

Italy: M. de Martino, M. Vannutelli.

This Commission met on February 8th and elected as President M. Tardieu of France, and as Vice-President Signor de Martino of Italy.

On February 4th, Greek territorial interests were presented and referred to an expert Committee composed of two representatives each of the United States, Great Britain, France and Italy, the Committee being authorized to consult representatives of the peoples concerned. Its membership was as follows:

*Commission for the Study of Greek Territorial Claims:*

United States of America: Dr. Westermann, Dr. Day.

British Empire: Sir Robert Borden, Sir Eyre Crowe.

France: M. Jules Cambon, M. Gout.

Italy: M. de Martino, Colonel Castoldi.

This Commission met on February 12th and chose M. Jules Cambon, of France, as President, and Sir Robert Borden, of Canada, as Vice-President.

On February 5th, the territorial claims of the Czecho-Slovak Republic were considered and referred to a Commission composed of two representatives from France, Great Britain, Italy and the United States, to examine the technical aspects of the question.

The situation of the Arabs was considered on February 6th and the claims of Belgium taken up on February 11th.

Interspersed between its consideration of these various and complicated territorial claims, the conference of the Great Powers found time to consider other questions. On January 27th, it created two commissions, one on financial drafting and another on economic drafting, with instructions to submit a statement of the broad principles

involved in their specific fields. These commissions were composed as follows:

*Economic Drafting Commission:*

United States of America: Mr. Bernard Baruch.  
British Empire: Sir Hubert Llewellyn Smith.  
Italy: M. Crespi.  
France: M. Clementel.  
Japan: Mr. Fukai.

*Financial Drafting Commission:*

United States of America: Mr. Albert Strauss.  
British Empire: The Rt. Hon. E. S. Montagu.  
France: M. H. Klotz.  
Italy: M. Salandra.  
Japan: Mr. Mori.

The Economic Drafting Commission, after several meetings, submitted a report suggesting agenda for a permanent economic commission.

The Financial Drafting Commission met on February 13th, under the presidency of Signor Salandra, discussed various proposals that had been submitted and instructed the secretariat to combine them into one for study as a whole.

On February 8th the conference of the Great Powers constituted a Supreme Economic Council to consist of not more than five representatives of each interested Government, to deal with questions of finance, food, blockade control, shipping and raw materials. The work of this council differs from that of the Financial and Economic Drafting Commissions in that the latter were created to deal with problems for future international agreement, while the former reports to the Supreme War Council on current matters during the period of the armistice. In conjunction with the military representatives of the Supreme War Council, the delegates of the Great Powers discussed from February 7th to 12th the terms of the extension of the armistice with Germany.

The members of the five Commissions authorized by resolutions of the Conference at the plenary session of January 25th were appointed during the succeeding week and started their labors.

The Commission on International Labor Legislation was composed of the following members:

United States of America: Hon. E. N. Hurley, Mr. Samuel Gompers.  
British Empire: The Rt. Hon. G. N. Barnes, Sir Malcolm Delevigne.  
France: M. Colliard, M. Loucheur.  
Italy: Baron Mayor des Planches, M. Cabrini.  
Japan: Mr. Otchiai, Mr. Oka.  
Belgium: M. Vandervelde, M. Mahaim.  
Cuba: M. Bustamante.  
Poland: M. Jean Zoltowski.  
Czecho-Slovak Republic: M. Benes.

It held its first meeting on Saturday, February 1st, and elected Mr. Samuel Gompers, of the United States, president.

The Commission on Responsibility for the War and its Authorization was constituted as follows:

United States of America: Hon. Robert Lansing, Mr. James Brown Scott.  
British Empire: The Rt. Hon. Sir Gordon Hewart, the Rt. Hon. W. F. Massey.  
France: M. Andre Tardieu, M. Larnaude.  
Italy: M. Scialoja, M. Raimondo.  
Japan: Mr. Adatei, Mr. H. Nagaoka.  
Belgium: M. Rolin-Jacquemyns.  
Greece: M. Politis.  
Poland: M. Constantin Skirmunt.  
Roumania: M. S. Rosental.  
Serbia: M. Slobodan Yovanovitch.

It held its initial meeting on February 3d. Honorable Robert Lansing, of the United States, was chosen president, and Sir Gordon Hewart, of Great Britain, and Senator Scialoja, of Italy, Vice-Presidents. Its work was divided among three sub-committees, two for the examination of questions of law involved in the subjects of responsibility for the war and for war crimes, and one for the examination of facts connected with the question of responsibility for violations of the laws and customs of war.

The Commission on Reparation of Damages was made up of the following delegates:

United States of America: Mr. Bernard M. Baruch, Mr. Norman H. Davis, Mr. Vance McCormick.  
British Empire: The Rt. Hon. W. M. Hughes, the Rt. Hon. the Lord Sumner, the Rt. Hon. the Lord Cunliffe.  
France: M. L. L. Klotz, M. Loucheur, M. Albert Lebrun.  
Italy: M. Salandra, M. d'Amelio, M. E. Chiesa.  
Japan: Mr. Mori, Mr. H. Nagaoka, Mr. Fukai.  
Belgium: M. Van den Heuvel, M. Despret.  
Greece: M. Romanos, M. Michalalopoulos.  
Poland: M. Sigismond Chamiec, M. Casimir Olszowski.  
Roumania: M. Georges Danielopol, M. P. Zaharaide.  
Serbia: M. C. Stoyanovitch, M. Milosh Savtchitch.

It met on February 5th under the presidency of M. Klotz, of France, exchanged views on the subject of the general principles on which the right of reparation should be based, and requested the several delegations to submit memoranda on this subject. These memoranda were submitted and examined on February 10th and several sub-committees appointed.

The Commission on the International Control of Ports, Waterways and Railways was composed of the following delegates:

United States of America: Hon. Henry White, Hon. David Hunter Miller.  
British Empire: The Hon. A. L. Sifton, Sir Hubert Llewellyn Smith.  
France: M. Claveille, M. André Weiss.  
Italy: M. Crespi, M. de Martino.  
Japan: Mr. K. Matsui, Colonel Sato.  
Belgium: M. Paul Segers.  
China: Mr. Chengting Thomas Wang.  
Greece: M. L. Coromilas.  
Serbia: M. Trumbitch.  
Uruguay: M. Juan Carlos Blanco.  
And representatives of Roumania, Czecho-Slovakia, Portugal and Poland.

It was organized on February 3d. Signor Crespi, of Italy, was elected chairman and Hon. A. L. Sifton, of Great Britain, vice-chairman. At the second meeting of this Commission, held on Febru-

ary 10th, it was decided to appoint two sub-committees, one consisting of nine members, five representing the Great Powers and four the minor Powers, to study questions relative to the application of the international régime of ports, waterways and railways; and the second consisting of ten members, five from the Great Powers and five from the minor Powers, to study the relevant general questions.

The Commission on the League of Nations was made up of the following representatives:

United States of America: President Wilson and Hon. Edward M. House.

British Empire: The Rt. Hon. the Lord Robert Cecil, Lieutenant General the Rt. Hon. J. C. Smuts.

France: M. Leon Bourgeois, M. Larnaude.

Italy: M. Orlando, M. Scialoja.

Japan: Baron Makino, Viscount Chinda.

Belgium: M. Hymans.

Brazil: M. Epitacio Pessoa.

China: Mr. Wellington Koo.

Portugal: M. Jayme Batalah Reis.

Serbia: M. Vesnitch.

Czecho-Slovak Republic: M. Kramarz.

Greece: M. Venizelos.

Poland: M. Dmowski.

Roumania: M. Diamandy.

President Wilson, on behalf of the United States, Lord Robert Cecil, on behalf of Great Britain, and M. Bourgeois, on behalf of France, held several informal meetings before this commission was formally organized. It held its first meeting on February 3d, under the chairmanship of President Wilson. A secretariat, selected from outside the membership of the commission, was appointed to draft the *proces verbaux*. It consisted of M. Clauzel, of France; Lord Eustace Percy, of Great Britain; Mr. Shepardson, of the United States, and Signor Ricci Busatti, of Italy.

After the first meeting of the Commission, it worked constantly and industriously, with the object of completing its report for presentation to the Conference before President Wilson's return to the United States on February 15th. In the eleven days which elapsed between February 3d and 13th, the Commission met ten times, many

of the meetings being held in the evenings and lasting until late in the night. When the first reading of the draft<sup>10</sup> was completed it was put into the hands of a drafting committee, composed of M. Larnaude, Lord Robert Cecil, Mr. Venizelos and M. Vesnitch. The second and final reading was completed on Thursday, February 13th, when the Commission authorized President Wilson to report the draft to the plenary session of the Conference to be held the following day, February 14th.

The third plenary session of the Conference met at three o'clock, on February 14th, for the purpose of receiving the report of the Commission on the League of Nations. The draft of the Covenant was read word for word by President Wilson, who interrupted his reading once or twice to explain his understanding of the meaning of certain phrases. After the reading of the document, President Wilson made a short address explaining the manner in which the Commission had worked and what it hoped would result from its report. He was followed by Lord Robert Cecil, of Great Britain, and Signor Orlando, of Italy, who expressed approval. M. Bourgeois, of France, next spoke and, while approving the document as reported, gave notice of two amendments which France refrained from pressing but reserved the right to propose at the proper time, and he requested that these amendments be considered in connection with the printed document. In substance, France's proposed amendments were, first, the organization of a system of armament inspection to ascertain if each nation is complying with the disarmament clauses of the Covenant; secondly, the creation of an international force,

<sup>10</sup> In the official *communiqué* of the meeting of the representatives of the Great Powers on the afternoon of January 22d, it is stated that the plenary session of the Conference on January 25th, would discuss the subject of the League of Nations upon the basis of the proposals made by Mr. Lloyd George. The proposal presented to the Conference on January 25th took the form of the resolution authorizing the appointment of the Commission on the League. The official *communiqué* of the first meeting of the Commission announced that "it was agreed that an accord in principle had been reached by the resolution previously passed by the Conference, and that discussion would proceed accordingly at the next meeting." According to an unofficial report of the first meeting of the Commission, the draft plan for the League of Nations which they agreed to use as the basis of discussion was laid before the Commission by President Wilson.

large enough to cope with any situation or crisis which may suddenly arise, until national armies could be assembled and sent.

Baron Makino, of Japan, gave notice that when the time came for discussion, his country would have an amendment to propose, it being generally understood that he referred to the question of racial discrimination.

Mr. Barnes, a second delegate of Great Britain to speak, upheld the argument of France for an international force. Other speakers were Mr. Venizelos, of Greece, Mr. Koo, of China, and the delegate from the Hedjaz, who approved the Covenant, and Premier Hughes, of Australia, who inquired when he would be allowed to discuss it, and was answered by Mr. Clemenceau that the Covenant would not be open for discussion until after it had been submitted to and discussed by the respective Governments.

After the foregoing remarks the meeting was declared adjourned.

The official text of the Covenant of the League of Nations as reported by President Wilson is printed in the Supplement hereto, page 128.

GEO. A. FINCH.

#### ADDENDA

Since the foregoing article was prepared the report of the Commission on the League of Nations has been made public, from which the following extract is quoted showing the proceedings upon the Covenant subsequent to the presentation of the draft to the Peace Conference on February 14, 1919:

"The draft Covenant of the 14th February was made public in order that discussion of its terms might be provoked. A great deal of constructive criticism followed upon its publication. Further suggestions resulted from hearings of representatives of thirteen neutral states before a Committee of the Commission on the 20th and 21st March.

"These various recommendations were taken under advisement by the Commission which held meetings on the 22nd, 24th and 26th March and on the 10th and 11th April. At the meeting of the 10th April a delegation representing the International Council of Women and the Suffragist Conference of the Allied countries and the United States were received by the Commission.

"At the meetings of the 10th and 11th April the Commission agreed definitively on the following text of the Covenant to be presented to the Conference: [The text referred to is printed in the Supplement hereto, p. 128.]

"At the last meeting of the Commission the following resolution was adopted:

"Resolved, that in the opinion of the Commission, the President of the Commission should be requested by the Conference to invite seven Powers, including two neutrals, to name representatives on a Committee

"A. to prepare plans for the organization of the League,

"B. to prepare plans for the establishment of the Seat of the League,

"C. to prepare plans and the Agenda for the first meeting of the Assembly.

"This Committee shall report both to the Council and to the Assembly."

## RECONSTRUCTION AND INTERNATIONAL LAW

THERE is a general disposition to assume that four years of dreadful war have so altered men's minds and characters and the underpinnings of organized society, that the world will be quite a different place from that which our observations and our studies have made familiar. This belief does not altogether carry conviction to my mind. The civilized world was threatened with an evil domination and combined to defend itself. This instinct and combination for defense are as old as the Greek Republics. For a generation to come the world will see less movement because of the war's exhaustion; it will have less money to spend and must economize; it will have higher taxes and therefore higher costs of production; here and there it will experience such change of governmental forms as should insure larger self-government.

But such results of war do not imply a change in human or even in national character. Peoples will continue to have that degree of control over their own destinies which their own character expresses and demands. The slavish nature will continue to live under a despot, whether he be called czar or head of a committee. The free spirit will continue to live under free institutions, because by self-knowledge and self-control he deserves them; and the title of the executive head of his state, whether king or president, is a matter of indifference. For realities and not forms are what count. Readjustment of existing principles to new conditions may be necessary, therefore, while reconstruction in the sense of the evolution of new principles and their application to a new world order, is unnecessary and unlikely.

It will be objected here that the French Revolution was a turning-point in the world's life, and that the present situation is comparable to that. I reply that it was not the upheaval in France that really counted, but the new philosophy which preceded the Revolution and brought it on; moreover, that there is nothing of a similar nature at the present, except perhaps the German theory of state



morality, and that has been discredited. The distinction is between a political philosophy which succeeded and revolutionized the world, and a political philosophy which has failed and will disappear.

Let us apply the doctrine that the old order has not fundamentally changed to the relations of states with one another. National animosities and jealousies and rivalries will not disappear in the coming era. Progress does not imply throwing away the fruits of the past. War will not be done away with, but only be made more difficult. And the rules of war will not greatly change, but the violation of those rules will be straightway punished. This is the ideal to work toward, remembering that the Law of Nations, like other law, in fact more fully than other law, is a growth and not a creation. If a weakness appears, we strive to remedy it, we do not seek to replace the entire fabric.

The principles of international law in time of peace are not so seriously controverted as to menace the world's progress. By a series of conventions ratified by the more important states and gradually covering all the relations of states in time of peace, we may hope to build up a code of rules, clearer, more comprehensive, perhaps more just than that body of usage heretofore recognized. Much progress has already been made in this direction.

It is the rules which govern the relations of states in time of war which are troublesome. In war there are three separate sets of interests involved, those of the two belligerent parties and of the neutral world.

Each of these three possesses rights and owes duties which are of very vital importance. Each accordingly will strain every nerve so to interpret any mooted question as to favor its own interest. Now in most wars the belligerents and neutrals have to give and take. There is such balance between them that neither can enforce his own view without concession. Hence it is accurate to say that the great body of law relating to war has grown slowly out of century-long discussions and compromises between belligerent and neutral.

We are just emerging from a war where two features, quite at variance with this growth process, confront us. For one thing, the neutral influence has been relatively so weak that it could not main-

tain its rights. For another, we have had to deal with a belligerent who has recognized as binding no rules or obligations which he deemed disadvantageous to his arms. His breach of the law, on the admitted principle of retaliation, has led at times to the same breach by his enemy. From this double attack upon the laws of war as accepted prior to 1914, chaos has resulted. What we want, therefore, is to get back to an earlier and better status and to devise some expedient for the future, which shall make the violation of its laws less likely, because more certainly and immediately punished.

My conception, then, of reconstruction and international law, is of the old system of law with new teeth, so that somehow some time a calculated breach, by individual or by state, will find a penalty. In order to understand the serious nature and extent of the problem, at this point I desire to catalogue and to classify the violations of law and the variations from accepted usage which this war has witnessed.

And first as to war on land. The war began with the unprovoked invasion of Belgium. There were two approaches to France, one across a common frontier, the other over neutral territory. The one was carefully guarded and fortified; the other fairly open to attack. The one to the south was broken by the Vosges Mountains, was shorter than the Belgian front and less suited to the wide sweeping advance of a huge modern army. The route through Belgium, on the other hand, was level and well supplied with rail and highway communication. It was preferred by the great German staff on the score of military convenience. Now to attack a friendly state with which one has no quarrel, simply because it is convenient to do so, is the unpardonable sin, the sin against the Holy Ghost. That Germany was itself one of the guarantors of Belgian neutralization, intensified a crime, it did not originate it.

The general principles which cover the rights of neutrals are laid down in one of the Hague Conventions, V, 1907. Articles 1, 2 and 10 read as follows:

Art. 1. The territory of neutral Powers is inviolable.

Art. 2. Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power.

Art. 10. The fact of a neutral Power resisting, even by force, attempts to violate its neutrality can not be regarded as a hostile act.

This convention was ratified by Germany, November 27, 1909. It merely stated with precision a rule which was perfectly well established and long operative. There can be, therefore, no shadow of doubt that Germany's crossing of Belgium to get at France was a breach of international law and of treaty. If the resistance of Belgium to invasion can not be regarded as a hostile act, as the article just quoted declares, then no state of war resulted and the German army was not entitled to consider Belgium an enemy state, and its territory occupied, with the rights which occupation gives the invader. This, however, is rather a matter for curious speculation than of practical importance, for when the whole country was overrun and local sovereignty crushed, the will of the German occupants was alone in a position to be enforceable.

Generally speaking, the principle which governs occupation is that occupied territory is governed by martial law in terms of the local law, that is, by the will of the commander working through local officials as far as possible, over country which by the actual constant presence of invading troops is not under the control of the legitimate sovereign. The 1907 Convention IV respecting the laws and customs of war on land, ratified by Germany, November 27, 1909, recognizes this principle, and even goes beyond it, in declaring that "the high contracting parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders." With this proviso, the Convention lays down rules which I have space only to summarize, in the most essential particulars.

The inhabitants of an occupied territory shall be considered combatants if they carry arms openly and respect the laws of war, even if they have not had time to organize as militia.

Prisoners of war may be set to work if the work is not excessive and does not relate to the operations of war. They shall be clothed and fed as well as the troops of the captor. All their personal belongings remain their property.

It is prohibited to employ poison; to refuse quarter; to employ means of destruction calculated to cause unnecessary suffering—explosive bullets, for instance; to make improper use of a flag of truce or the badges of the Geneva Convention; to destroy enemy's property, unless imperatively demanded by the necessities of war; to attack or bombard by whatever means, towns, villages, dwellings, or buildings which are undefended; to pillage, even when a place is taken by assault; to use projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases; to use bullets which expand or flatten easily in the human body; to force information from the inhabitants of occupied territory.

I add two significant articles verbatim:

Art. 46. Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property can not be confiscated.

Art. 50. No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they can not be regarded as jointly and severally responsible.

And finally comes Art. 56:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

As to the use of expanding bullets, there is no convincing and overwhelming evidence of it on the part of either belligerent. Our own country did not sign that agreement and therefore can not claim protection under it. Probably soldiers in every army occasionally whittle their cartridge tips and make them soft-nosed.

But barring this prohibition, every other rule which has been cited, according to a mass of evidence which has been gathered, has been violated by the German Army apparently with the connivance or at the order of its high officers. Except in retaliation, there is no proof of the breach of these rules by the Entente Powers.

And then as to war on the sea.

The very first act of naval war in the contest was the laying of floating contact mines in the high seas by the Germans, presently imitated by the Entente Powers. The Hague Convention VIII, 1907, thus legislates in this matter:

It is forbidden "to lay unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them;" "to lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings;" "to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping."

Germany signed the Convention, subject to a reservation of this last provision. But from August 7th she relied largely upon mines of the two earlier classes to keep the British fleet in check, without observing the rule as to such construction as made them innocuous when unwatched or drifting. This was the entering wedge of the mined area or war zone practice, which grew to great proportions in the hands of both belligerents in the course of the war. The laying of mines in the high seas area is not alone a violation of the convention just cited; it is also an exercise of sovereign control over waters outside those territorially owned, which violates neutral rights. The United States Government, the strongest neutral then existing, naturally protested against British as well as German action, not accepting the theory that retaliation in kind at the cost of the neutral could be justified. This is perhaps the only limitation of "the freedom of the seas" which this war has shown to be clearly open to criticism.

To make this clear it may be well at this point in the narrative to group together the other complaints which our government while neutral pressed against the Entente Powers. They relate to blockade, to methods of search, to the enlargement of the contraband list, to extraction of enemy persons from neutral ships on the high seas, and to a limitation of trade with other neutrals or rationing. When we became belligerents we shared in applying the last named restriction. It was a novel and unpleasant though perhaps unavoidable feature of the war.

Our criticism of the British blockade of German ports was two-

fold: first, that on account of the submarine menace it was conducted so far from the German coast as to bring its legality in question; second, that it was not applied to the trade between Sweden and Germany's Baltic ports and was therefore discriminatory, whereas the first essential of a legal blockade is that it must affect all neutrals alike.

As to contraband, there was constant enlargement of the list, there was constant shifting of commodities from the class of what is only occasionally or exceptionally contraband to that which is absolute. Owing to the growth of scientific adjuncts to modern war, there is scarcely an article or substance which may not have relation to it. Contraband is not covered by any Hague Convention; moreover, the Declaration of London, which attempted to lay down the rules of naval war, was not ratified by Parliament and was, therefore, in this war not in effect. One must resort to the naval prize codes of the various states to learn its definition. Thus the German Prize Code in force in 1915, Arts. 22 and 24, declares that "to the list of absolute and of conditional contraband must be added such other articles and materials as have been expressly declared" to belong in these classes by the German Empire. The British Admiralty went on the same principle. Though exasperating this enlargement of the contraband list from time to time is not unfair, because new methods or substances come into use. Thus, rubber was placed as late as 1909 amongst commodities which could not be called contraband in the abortive Declaration of London, and by 1914 on truck, ambulance and airplane wheels it had become of first rate importance in war.

There were a few cases of the removal of German reservists and other subjects from neutral ships on the high seas, the offense which in the Trent affair during our Civil War led so nearly to a break with England. This practice was so clearly illegal, however, that it was not persisted in and in most cases the captives were surrendered.

The British right to search we did not question, but the delays incident to this were complained of, often including the landing and investigation of the entire cargo on mere suspicion. So likewise was the assumption that much of our trade with Holland and with Sweden and Norway was really with Germany, on the theory of the con-

tinuous voyage. To avoid this suspicion, Holland devised a system by which all imports were billed to a single agency which guaranteed non-exportation. And yet the home-grown equivalent of the importation might be exported, and trouble resulted. Switzerland and Holland were dependent very largely upon Germany for coal, and Germany drove a hard bargain, compelling foodstuffs in exchange. Then, as all supplies the world over grew scarce, the Entente demanded its share of any exportable food. And, finally, when the United States entered the war, it supplied the needs of its partners before it fed the neutral, and had only a meager allowance for the latter, thus between two millstones.

The various causes of complaint which have been mentioned led to animated diplomatic interchanges, too long deferred by Mr. Bryan, but pushed with skill by Mr. Lansing. They might easily have grown into a serious situation. For when the British authorities said, if you think yourselves wronged, appeal to our courts, we replied, "Your courts are bound by Orders in Council and are not free therefore to do exact justice. You are governed by military necessity at sea just as fully as the Germans are on land." Then the air was cleared by the judgment of the British court in the *Zamora* case, the Judicial Committee of the Privy Council, the highest court having jurisdiction in Admiralty. This is a matter of such importance as to warrant a moment's notice, for it showed the real gulf existing between German and British standards of justice.

The *Zamora* was a Swedish vessel loaded with copper which, under the circumstances, was contraband. But instead of trying the case and condemning the cargo, the authorities, acting under an Order in Council, which represents naval necessity, requisitioned it. Thus there came about a conflict between international law and an executive order. As to this the court declared repeatedly in no uncertain voice that international law was paramount.

The idea that the King in Council, or indeed any branch of the Executive, had power to prescribe or alter the law to be administered by courts of law in this country was not in harmony with the principles of our Constitution.

A prize court must of course deal judicially with all questions which come before it for determination, and it would be impossible

for it to act judicially if it were bound to take its orders from one of the parties to the proceedings.

If the court is to decide judicially in accordance with what it conceives to be the law of nations, it can not, even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfill its function as a prize court, and justify the confidence which other nations have hitherto placed in its decisions.

It will be noticed that none of the British acts of which our government complained affected the life or limb of any American citizen; property alone was involved, owing to what we held to be a mistaken idea of a belligerent's rights as against neutral trade. Far otherwise was it with German methods at sea. Except for occasional forays, her surface fleet was kept behind barriers. Her raiders and Pacific squadron in time were wiped out. There remained only her under-water boats to blockade, to search for contraband, to prey upon enemy's commerce and repress the neutral.

The U-boat is flimsily built, of small stowage capacity, and necessarily handicapped in doing cruiser work. Consequently, it has claimed a preferential position, enjoying all the rights of a cruiser without its obligations. This the neutral has denied. If it is used for blockade, such blockade must be made effective by the continuous presence of sufficient ships to make access to the ports or coasts blockaded extremely difficult. This was never the case. The occasional appearance of a submarine, coupled with dire threats of sinking if neutral ships resort to certain specified areas, does not constitute a valid blockade.

So with contraband. Visitation, search, seizure, safe disposal of the personnel, this orderly sequence of events must precede condemnation by a court. In only a few cases before this war have neutral ships carrying contraband been destroyed.

Destruction of the enemy's merchantmen for want of ports open to prizes is a harsh but legitimate penalty, always subject, however, to such disposition of passengers and crew as humanity demands. Otherwise the act of sinking is murder. That happened in the case of the



*Lusitania*. But the German sinking without warning of numberless neutral ships was infinitely worse. For in such case to murder is added the illegal destruction of neutral property without that search which is essential to discover nationality, destination and loading.

When this issue was fairly joined with the United States there could be but one outcome. A state which permits its subjects to be murdered and their property destroyed without armed protection, fails to perform its duty as a state and is no longer entitled to the allegiance of its citizens. Thus war was inevitable. Whatever idealistic motives may have also had weight, the war was fundamentally one of self-defense.

This, then, is an outline of the many serious violations of the rules of war by land and by sea, perpetrated largely by one of the belligerents, which have marked the last four years, and the reconstruction of international law involves the plain question, how a repetition of these war crimes can be forever prevented. The answer I think is twofold, by the prevention of war itself and by the punishment of the crimes.

Two movements have gone on side by side for as many generations, for the abolition of war and the humanization of war. They assume that offenses will come, and then try either to find a workable substitute for war as a means of settlement, or, if resort must be had to war, try to minimize its evils by stringent rules laying down how non-combatants and their property shall be treated, how combatants must treat one another and what precisely are the rights and duties of the outsider, the neutral nations.

The punishment of war crimes is necessary for the humanization of war, because this latter depends upon laws, and laws must be enforced under penalty. These crimes are against the person and against property; the party answerable for them may be a government or an individual. When a state is guilty, as for instance our own country would be if by act of Congress unjust war should be levied, the only penalty possible is a pecuniary one, an indemnity. Practically, an indemnity can be levied and collected only as the result of successful war. And it is difficult to determine the justice of a war to assess the guilt of a whole country, except on the evi-

dence of historical investigation. We, therefore, have the illogical, the painful, fact to face, that only the loser pays an indemnity, whether he be in the right or in the wrong. The individual can be held responsible more easily, yet even in his case the tendency will be to punish losers only. Hence the ideal system must place both trial and punishment in neutral hands.

There is another way of checking war crimes, namely, by retaliation, by treating your enemy as he treats you. This is not by way of revenge, but is what Professor Lieber calls "protective retribution." One violation of law is punished by the commission of another. Thus the poison gas weapon of the Germans in the recent war was met by gas more poisonous still. Denial of quarter is punished by the refusal of quarter in turn. If the war criminal is captured, of course he bears the penalty in his own person. But if he is not in his enemy's power, that enemy under the principle of retaliation may punish any one whom he has captured. This is not a satisfactory method of penalizing crime, though it is legal and better than nothing.

I would suggest that war crimes are against the person and against property; that the penalty might be similarly a pecuniary one or a personal one; that its nature and degree follow the usage of the country of the defendant, and that if possible a system be worked out whereby investigation of alleged crimes may be speedy, and certain punishment be visited upon conviction. Such a plan is not a novelty. Certain writers have advocated it, and the Carnegie Commission argues its necessity in that terrible catalogue of war crimes which it lists in its report on the atrocities of the Balkan Wars. If no such plan can be made operative, and if in subsequent wars the same disregard of the rules should be evident as in this war, then the laws of war are no better than a dead letter. But I look for a commission to investigate and punish German war crimes, as one outcome of the Peace Conference.

The other movement, for the substitution of some kind of judicial procedure for war as a means of settling differences between states, has been the dream of the ages. A vast literature has grown up concerning it. Societies exist to further it. And real progress has

been made through the special arbitration of hundreds of international disputes, by courts chosen *ad hoc*. Few of these disputes, however, would have resulted in war, even if not thus settled, because they were relatively unimportant. What is wanted is a substitute for war, not a mere substitute for diplomacy, which most arbitration is. Nevertheless, there is a judicial quality in arbitration which is not sufficiently recognized by the advocates of a world court which shall have jurisdiction over all questions. Thus, the award of the King of the Netherlands in 1831 in the Northeastern boundary dispute with Great Britain, was really a suggestion of compromise, not a decision on facts and questions submitted. It was, therefore, rejected by both parties to the treaty of submission.

When two states agree to arbitrate a particular dispute, it is the presumption that they contemplate losing as well as winning the case, and that they prefer to lose it rather than to use force. But in all the proposals of a general arbitral system prior to the last century, except Kant's, whether called Court or Congress or League, the judgment given was to be executed, if necessary, by force. It is just in this particular that the two systems differ radically. And therefore in studying any new proposal which aims at the replacement of war by some substitute for it, one must always inquire what are the means of enforcing a verdict. If they exist, there may result war to prevent war; but this risk must be run. Fundamentally this is the justification of war, that it is the attempt to execute a judgment though that judgment is self-pronounced. When the judgment is pronounced by some extra-national court or league, the power to execute must still be provided. Otherwise the system is a failure, and the court an object of contempt.

In an orderly, well-policed community, law is enforceable because the agents of the law are organized and armed. The opponents of law and order are unorganized and usually forbidden to carry arms. Must it not be the same if a number of states pool their forces for the sake of international order; military power must be surrendered by the individual state and concentrated in the hands of the league. Is it too much to say that the first essential of success, if a league of states attempts to judge and to police international

society, is that the military power in its hands shall be relatively predominant? This means that the members may retain only force enough for domestic control; that they surrender their great standing armies and their systems of universal conscription, their fortresses and their arsenals, so that if a member state does resort to war, its preparations shall take a year or more. Disarmament, delay in ability to strike, centralized power, and the consciousness of the solidarity of the many states in league against the one independent, these seem to me to be the prerequisites to a workable scheme of combination against war. Here it may be noted that if a state surrenders its system of universal service, the officer class automatically is forced into civil life, with a consequent change of ideals; moreover, that the great munition factories beat their swords into plowshares; and lastly that war, though not impossible, is certainly made more difficult. If we would be honest, perhaps this final conclusion is all that we have a right to expect.

But besides the military power of execution lodged in the hands of a league, it must have economic pressure at its command also. If one contemplates an international boycott loyally carried out it is a tremendous weapon. Ships are refused entrance to all ports; all traffic is cut off; raw materials are denied; there are neither mails nor cables nor personal intercourse; as by a stroke, the national body is paralyzed.

Perhaps too much stress has been laid upon the ability of a league, aspiring to substitute law for force, nevertheless to have force at its command. President Wilson, as the apostle of such a league, has suggested the value of friendship as its foundation. But a political society is a very peculiar thing. It is compounded of racial and historical prejudices, of trade rivalries, of lingual and geographical limitations, of anything but friendships. Friendship is hardly a status in itself; it grows rather out of other factors, like trade which is mutually profitable, like political interests which are identical. Is it better to preach a gospel of perfection, or to found your system on things as they are?

To understand the proposed League Constitution we must begin with Mr. Wilson's fourteenth point, because the armistice is based

upon his program and peace is patterned after the armistice: "A general association of nations must be formed, under specific covenants, for the purpose of affording mutual guarantees of political independence and territorial integrity in great and small states alike." And his number four demands, "Adequate guarantees given and taken that national armaments will be reduced to the lowest point consistent with domestic safety."

This is disarmament, which is good, coupled with a league for the preservation of the *status quo*, which is not so good. The object of a league was amplified in Mr. Wilson's Fourth of July address, to "check every invasion of right and serve to make peace and justice more secure by affording a definite tribunal of opinion to which all must submit and by which every international readjustment, that can not be amicably agreed upon by the peoples directly concerned, shall be sanctioned." This rather vaguely implies territorial changes in states, if sanctioned by the league, and removes the reproach that the war will result in a world stabilized but hidebound.

On September 27, 1918, came further enlightenment: The league must be part of the peace settlement. It is necessary to guarantee the peace. It must involve impartial justice; must consult a common interest; must exclude selfish economic combinations; must also exclude special alliances and economic rivalries and hostilities. Passing by the futility of this last phrase (for states without economic rivalry are states that are dead), it is noteworthy that nowhere does Mr. Wilson's league program call for the settlement of disputes by any judicial process.

In a similar strain, the day the armistice was signed, Lloyd George said: "A large number of small nations have been reborn in Europe, and these will require a League of Nations to protect them against the covetousness of ambitious and grasping neighbors." But on the 5th of January he had gone beyond this purely political conception of a League, saying, "A great attempt must be made to establish by some international organization an alternative to war as a means of settling international disputes."

This was also in Lord Curzon's mind, June 26, 1918: "We must try to get some alliance or confederation or conference to which these

states shall belong, no state in which shall be at liberty to go to war without reference to arbitration, or to a conference of the League, in the first place."

Lord Robert Cecil goes very much farther, urging that a League was essential to the relief of starving peoples, to the regulation of railways, posts and wires. He laid upon it also "public health and the protection of women and juveniles in industry" and the guidance of backward peoples.

A year earlier the French Chamber of Deputies resolved that victory must bring "durable guarantees for peace and independence for peoples, great and small, in a League of Nations such as has already been foreshadowed."

And there are many contemporary expressions of approval of the League principle, but equally vague as to what the details shall be.

The program of Mr. Taft's League to Enforce Peace, however, is not vague; it is quite specific in advocating the tribunal idea, in backing it with force, so as to insure delay at least, and in promoting world progress as well as world peace.

These various programs show the extremes of opinion which the League discussion has brought out. They also convince one that some kind of a League is really probable. It is now or never. It is the psychological moment. But is it to be chiefly machinery for the education and protection of the new states which the peace may create; or may there be coupled with this a kind of international uplift movement!

The first is wise, provided it does not copy the Holy Alliance. That league in 1815, in the name of Christianity, to perpetuate religion, peace and justice, tried to stabilize European political society in the interest of absolutism; it even planned to extend its influence to this continent. This League must not similarly, in the name of peace and justice, try to stabilize the world in the interest of democracy. It would be an identical blunder. For when, to use the prevalent phrase, self-determination of a people has formed a state, that state is endowed with sovereignty and independence and, like maturer states, has the right to be let alone. Its future must be determined by itself, not by others.

As for the second ideal, a socialized international society of states built up on a basis of altruism rather than on reciprocal benefits—it is built upon the sand. A proposal that all war debts on the victors' side shall be pooled and then redistributed on the basis of population or national wealth, has been seriously made and is a valuable commentary on the new gospel. Moreover, it is practical politics today, to emphasize nationalism as against internationalism. Nationalism is the consciousness of race and desire of sovereignty; we see it in its finest expression in Bohemia. Internationalism, on the other hand, exalts social welfare and class interest above the race and the state. That way lies Bolshevism. The one is antidote to the other.

At the other extreme is a League which shall offer a reasonable way of keeping the peace between states by providing a tribunal for judging their differences, with fair assurance that the award can be executed; by setting up a system of conciliation in disputes which are not justiciable; by a self-denying renunciation of war between the members; by making delay certain and settlement probable after an issue is joined. But it does not absorb the sovereignty of individual states; they retain their sovereignty. It does not attempt to govern the world, but to make the world more peaceable.

Of these two ideals, my own judgment, or perhaps it is prejudice, inclines to the less ambitious program just indicated. It places responsibility for conduct where it belongs, within the state, and not in a league outside it. Its working would be easier, its breakdown less dangerous. But perhaps the outcome may be somewhere between the two extremes, stressing for the moment the need of enforcing the terms of peace and of giving a fair start to the backward peoples which have just achieved statehood.

And here it may not be amiss to place together the desirable features of a rational International League, in accord with the principles above advanced, but somewhat more specifically.

Its members retain their sovereignty, each one, but by treaty for an experimental period, confer certain powers upon a central body.

These powers are partly administrative, partly judicial, but not

legislative. Legislation should require further treaty cooperation in each new proposal.

The administrative powers are to be used, first, to protect newly formed states; second, to enforce other conclusions of the Peace Treaties, such as disarmament; third, to carry out decisions of the League.

Its judicial powers are to conciliate or judge disputes between members and more widely to substitute law for force in international relations, so far as possible.

Disarmament must reduce the strength of the individual members and thereby relatively increase the *strength* of the central body, i.e., the sum of the military units put at its disposal.

The League must also have the power of boycotting as one of its weapons, but otherwise is not an economic union.

Its field is political; it relegates social problems to the member states. For instance, women's and children's labor in Japan or Brazil, seamen's wages in India and the United States, can not be regulated from a League capital without disaster.

It is a loose union for the prevention of war; with no ulterior aims beyond this; a limited but a safe conception.

This was written before the first draft of the League Constitution was given out at Paris, and even yet the last word has not been said. Judging it in the light of the principles tentatively set forth above, it would seem to have avoided much that would be dangerous and to embody much that is hopeful and valuable. Its members retain their sovereignty. Much stress is laid upon disarmament and the control of private munition factories. Defense against external aggression is contemplated, but the right of a state to change its own condition is not questioned. As between members of the League, disputes are to be submitted either to arbitration or to inquiry by the Executive Council before resort to war; this implies a certain delay. Such submission to arbitration is voluntary, however, while the resort to inquiry at the hands of the Council is obligatory, an international league boycott being the penalty for non-compliance. The Council may also use force. These provisions are obscure and need rephrasing.



If the dispute is between a League member and an outside state, such state is forthwith to be asked to join the League for the purpose of settling the difference, but whether it does so or refuses, the Executive Council may use its judgment in trying to keep the peace, acting in accordance with League principles. This is vague and unsatisfactory.

Then there is a novelty in placing German colonies and backward states under the protection of advanced powers which are called Mandatories. The only provision for social welfare is in Article XX. "The high contracting parties will endeavor to secure and maintain fair and humane conditions of labor for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend; and to that end agree to establish as part of the organization of the League a permanent bureau of labor." This does not call for uniformity of conditions, and is probably both meaningless and harmless.

Of course, it is too early to criticize textually. Nor has reference been made to other subjects treated in the Constitution, but which are not germane to the special purpose of this paper. In general, it seems to the writer that the effectiveness of the League machinery for checking war depends upon the impression of solidarity which the League produces, and that this solidarity will depend too largely upon the make-up of the Executive Council. But read in connection with the disarmament stipulations, the judicial provisions should be reasonably, perhaps absolutely, workable.

These, then, are the two principal changes which international law should find impressed upon its system as a result of the great war, a league of states which retain their sovereignty but agree to get the judgment of the whole body in some way before resorting to war; a method of investigation and punishment which would make the violation of the laws of war highly dangerous.

There are now two or three other particulars in which the old law of nations may have new light cast upon it as a result, or by-product, of the war. If a tribunal, under whatever auspices it comes into being, adjudges international causes, it will need a code of law, and it will also tend to build one up. The code with which it will

set out is one of usage supplemented by treaty compact. It may lack precision, but is workable nevertheless. In time the demand for a Code of International Law will create one, not as a whole, but in parts—diplomatic intercourse, for instance, or maritime jurisdiction, or the laws of war on sea. Meanwhile, the court itself by dint of judicial decisions will add to and clarify the law which it administers. This double process of growth is a better, more reasonable, form of code-building than codification covering the whole field and jeopardizing its results by attacking in one engagement all the burning questions. This method of growth through the arbitral decisions of the last half century, has already been marked. Thus jurisdiction over seals' swimming free in the high seas has been denied to the country of their origin. The Alabama arbitration enlarged neutral duty and defined due diligence in its performance. Light was thrown upon the question of how territorial waters shall be measured, in the Alaska and Newfoundland cases. It is not necessary to multiply examples.

Another question which the events of the war have brought into prominence and which the future law might possibly take cognizance of, relates to armed intervention in the affairs of a state with which one is not at war, on the plea of self-defense. The condition of portions of Russia illustrates what is meant. The forces of anarchy, of chaos, have gained the upper hand. Life and property of native and of alien are in jeopardy. The obligations of the old state are disregarded. Moreover, the spirit of misrule, like a religion, is being spread as widely as possible over the world. Our own country, Uruguay, Argentina, Mexico, are objects of attack, besides contiguous states. Shall resistance to these noxious doctrines be defensive only, or may they be attacked at their source? We justify the presence of our troops in Russia at this moment on the ground of self-defense, as an outcome of war. But if no declared war existed, and organized society found itself attacked out of a clear sky, under the new dispensation, what is society to do? Here is war no less real and dreadful because unregularized. If a league of states exists to keep the peace, with powers to settle disputes and to police the world granted to it, the anarchical menace, if anything, should call those powers out.

Yet, on the other hand, if we incorporate into the new League the right of intervention in the affairs of individual states for any purpose whatsoever, we run a serious risk; we play the rôle of the Concert of Europe; we weaken the educative power of responsibility. To frame a formula for the conduct of a League of Nations, which shall be broad enough to crush anarchy anywhere, yet restricted enough to guarantee to each state sovereignty and independence, will require high statesmanship.

I have spoken of the educative power of state responsibility. In theory this should be a result of independence. But on our own hemisphere we see too many examples of the failure of the rule. Through the Monroe Doctrine we have shielded our neighbor republics from foreign intervention, doing it for our own sake and often resented by them. We mean well by them. Certain of their qualities we admire. But excepting half a dozen of the better developed, the Latin American states, from their want of order and of education and of self-control, are a menace to our world. Shall they and their problems, like Bolshevism, come before the League for treatment? Or shall an American league be set up for local treatment, to assume both responsibility and control? Or more probably still, shall this old world and this new one muddle along very much as they have since the beginnings of history, gaining here a little and there a little, the law of their relations changing with the law of their progress, the moral uses of dark things revealed, to those who can see, by Divine Providence.

When a criminal breaks the law and at last is caught and punished, we do not say that the law has broken down; we say rather that it has been enforced, that the law works. So is it with the law which governs the relations of states. It has been cruelly violated. There were times when the criminal seemed immune. But his punishment has begun. Every restitution, every penalty, every act of atonement, is proof that the law he scorned is stronger than he. Its grasp is firmer, its future is brighter than before, and its field is greater. Like the last runner in a relay we have reached the line, and the line is justice.

THEODORE S. WOOLSEY.

## THE GERMAN CONCEPTION OF THE FREEDOM OF THE SEAS

THE World War has given rise to some of the most remarkable views or expressions of opinion, particularly in Germany, regarding the freedom of the seas that have ever been uttered. Indeed, it may be said to have revived this old controversy in an entirely new form, but with the ideas frequently stated in the most excessive manner. Though, along with many other products of German war psychology, the most extravagant of these views seem for the most part to be doomed to defeat, and perhaps to a deserved oblivion, yet there may be a nucleus of sense or residuum of wisdom in some of them that is worthy of consideration. In any case, it may be claimed that they possess a certain historical or academic interest which appears to justify this discussion and record, filled, as it is, with copious extracts.<sup>1</sup>

There have been in Germany during recent years two extreme and fundamentally opposed conceptions of the freedom of the seas, or rather, of the *means* through which this so-called freedom may be attained and preserved. And these conceptions of means or methods have been held as applicable in securing this freedom in times of peace as well as during war. This fact is thus stated by the German authority on naval matters, Captain Persius: "There are two theories in Germany, one advocating the freedom of the sea by virtue of a huge

<sup>1</sup>The documentary basis of this article is a collection made by the writer of several hundred pages of extracts drawn from many and various sources. These sources include a number of German pamphlets on the "Freedom of the Seas," notably the one by Meurer (to which repeated reference is made in the text), German periodicals of various sorts, including newspapers as well as magazines, resolutions and petitions adopted by the political parties, chambers of commerce and other public bodies in Germany, speeches of leading German statesmen and politicians, articles and lectures by German authorities on international law, etc. A considerable number of them were drawn from *Das annexionistische Deutschland*, by S. Grumbach, Lausanne, 1917.

navy, the other advocating the attainment of the same end by an international agreement."<sup>2</sup>

At one extreme are those (apparently the most numerous, or at least the most vociferous) who rely solely or mainly upon might—the believers in sea-power, of whom Count Reventlow may be taken as a characteristic type. To this school have belonged most of the Pan-Germanists and Imperialists, from the Emperor down to the lowest ranks of the former official, military and naval hierarchy. It seems to have included nearly all the university professors, many of the leaders of the industrial and commercial classes, and even some of the Socialists.

The German Emperor was one of the most vociferous exponents of this school. He has given expression to his sentiments on this subject in such oft-repeated sayings as these: "Our future lies on the water." "The trident must be in our hands." "I will never rest until I have raised our navy to a position similar to that occupied by our army." "Germany's colonial aims can only be gained when Germany has become lord of the ocean."

Count Reventlow may be regarded as one of the most aggressive and vigorous champions of the Tory or imperialistic view of sea-power in Germany. The following extracts from his lectures and writings will give a fair idea of this doctrine.

In a lecture on the "Freedom of the Seas," delivered at a great public meeting held at Berlin in March, 1917, Count Reventlow is reported as having said:

What do we Germans understand by the freedom of the seas? . . . Of course, we do not mean by it that free use of the sea which is the common privilege of all nations in times of peace, the right to the open highways of international trade. That sort of freedom of the sea we had before the war. What we understand today by this doctrine, is that Germany should possess such maritime territories and such naval bases, that at the outbreak of a war we should be able, with our navy ready, reasonably to guarantee ourselves the command of the seas. We want such a jumping-off place for our navy

<sup>2</sup> See article in the *Berliner Tageblatt*, March 2, 1918. Captain Persius appears, however, to be skeptical as to whether freedom of the seas in time of war can ever be attained. "In times of peace," he remarks, "it has never been questioned," thus differing from most German publicists on this matter.

as would give us a fair chance of dominating the seas and of being free of the seas during a war. The inalienable possession of the Belgium seaboard is therefore a matter of life and death to us, and the man is a traitor who would faintheartedly relinquish the coast of England. Our aim must be, not only to keep what our arms have already won on the coast, but sooner or later to extend our seaboard to the south of the Straits of Calais.<sup>3</sup>

Again, in an address on "Nationality and World Trade," delivered on February 18, 1916, Count Reventlow said:

The first requisite, in order to be able to take part in world affairs, is freedom of the seas, a freedom founded on might, not on paper treaties. In the first place we should be able to build more harbors on the North Sea, and indeed nearer the Channel. We hope to find a physician who can heal this geographic malady by means of geographic homeopathy. . . . We may consider as actual guaranties only such measures as lie within our own power and within our geographic province. This is Bismarckian Realpolitik.<sup>4</sup>

In another connection, the same champion of German sea-power says:

Germany must do like the prophet who went to the mountain, since the mountain would not come to him. The free ocean will not come to us. We must, therefore, move up to it and politically correct the political sin which the past, in league with geography, has committed against Germany. Since the early part of the war the Belgian coast has been in our hands. It will have to serve the German Empire's purpose of extending the German North Sea angle down to the Channel, and indeed as far down as possible. This extension is a wholly natural one, politically as well as geographically. We are not saying this as wild Chauvinists, but as quiet judges. The purely economic and commercial factor we have been able to touch upon only superficially. Instead, however, the testimony of an acknowledged authority will serve the purpose. The Director General of the Hamburg-Amerika Line, Mr. Ballin, has repeatedly declared in public speech and in writing, during the first half of the war: "It is absolutely necessary to come out of the wet triangle. That is precisely what we have demonstrated, for by the wet triangle is meant that corner off the North Sea coast the two legs of which form the German coast line. Now the only way out of our past and present situation is by means of such an extension as we have indicated. Geography leaves us no other choice."<sup>5</sup>

<sup>3</sup> See N. Y. *Times Current History*, Vol. VII, Part 1, November, 1917, p. 345.

<sup>4</sup> As reported in the *Preussische Kreuzzeitung*, February 19, 1916.

<sup>5</sup> The Sealed North Sea (a Compilation of Popular Lectures on Sea-Lore, 1915, No. 105).

Citations might be multiplied *ad nauseum* to illustrate and demonstrate the wide prevalence of this imperialistic or Tory point of view in Germany. It appears to have resulted primarily from a strong fear and hatred of England—a fear and hatred strongly infected with jealousy and a desire to imitate supposed English methods of gaining and maintaining British sea-power.

At the antipodes, or opposite extreme, of the believers in sea-power are those who favor neutralization, or, to use a better term, internationalization of the high seas, as well as of international waterways, by negotiation and agreement between the Powers. This class seems to include a majority of the Socialists, the peace advocates and internationalists, like Professor Schücking, as also some of the leaders of the bourgeoisie, or middle classes, such as Dernburg and Erzberger.

The views of this school may be illustrated by the following extracts from some of its leading exponents:

I, personally, would go so far as to neutralize all the seas and narrows permanently by a common and effective agreement guaranteed by all the Powers, so that any infringement on that score would meet with the most severe punishment that can be meted out to any transgressor.<sup>6</sup>

The whole fight, and all the fight, is, on one side, for the absolute dominion of the seven seas; on the other side, for a free sea—the traditional *mare liberum*. A free sea will mean the cessation of the danger of war and the stopping of world wars. The sea should be free to all. It belongs to no nation in particular—neither to the British nor to the Germans, nor to the Americans. The rights of nations cease with the territorial line of three miles from low tide. Any domination exercised beyond that line is a breach and an infringement of the rights of others.

To prevent wars in the future we must establish that the five seas shall be used exclusively by the merchant ships of all nations. Within their territory people have the right to take such measures as they deem necessary for their defense, but the sending of troops and war machines into the territory of others, or into neutralized parts of the world, must be declared a *casus belli*. The other alternative would be to forbid the high seas to the man-of-war of any nation whatsoever, to relegate them to territorial waters, and to permit only such small

<sup>6</sup> Extract from a letter written by Herr Dernburg, former German Colonial Secretary and propagandist, read at a German meeting at Portland, Me., on April 17, 1915. See *N. Y. Times Current History*, II, pp. 279-281.

cruisers as are necessary to prevent privateering. If that be done, the world as divided now would come to permanent peace.<sup>7</sup>

It will be asked, to what extent can real guarantees be given for a lasting realization of this "Open Door" and "Freedom of the Seas" program? They are conceivable. Nevertheless we do not deny that to safeguard the "Open Door" and "Freedom of the Seas" it will be essential that assurances be given backed by treaties. . . .

A substantial part of the guarantee of the future peace is precisely to be sought in the further development of international law . . . and in a system of international treaties. . . .<sup>8</sup>

The draft Constitution of the League of Nations, drawn up and worked out in detail by the leader of the Centre Party, Herr Erzberger, contains some provisions for the internationalization of the high seas, as well as of international waterways:

Members of the League are to recognize the principle of the freedom of the seas. Straits and canals and connecting seas, in so far as both banks are not in possession of the same Federal State, will be internationalized. Their fortifications will be retained and guarded by a commando consisting of contingents from all the Federal States, and commanded in turn every three years by a delegate of the neutralized States.

The Federal States will proclaim the safety of private property on the high seas. Naval prize law and blockade law are to be abolished. Exercise of the right of blockade is reserved to the League, and only to the League as such, against any Federal State which violates the constitution of the League or which takes up arms against a Federal State. Ships of Federal States and their cargoes shall be given the same treatment by each Federal State as is given to that State's own vessels. Oversea cables are to be controlled by a committee of the League. The members of the League are to renounce the raising of troops in their colonial territories. All States and colonies situated in Africa are to be perpetually neutral States.<sup>9</sup>

In an interview, published in the Paris *Matin*, of February 2, 1919, Herr Erzberger is reported to have said:

By freedom of the seas I mean the complete freedom of trade for

<sup>7</sup> From a speech delivered on January 9, 1915, at the Republican Club, New York, by Herr Dernburg.

<sup>8</sup> Excerpt from the *Anti-annexationist petition of the New Fatherland League* presented to the Imperial Chancellor and the members of the Reichstag early in June, 1915.

<sup>9</sup> See *Daily Review of the Foreign Press*, September 24, 1916.



all peoples upon all maritime routes, upon all straits as well as on the open sea.

In times of war, by freedom of the seas I mean the abolition of the right of blockade and of the seizing of ships as well as of prize courts.

And I connect with this freedom of the seas that of the air. It should be forbidden to all enemies to make aerial attacks, in such wise that the air, as well as the sea, will be reserved for the transport of things essential to life.

In a recent speech to the German National Assembly at Weimar, on February 14, 1919, Count Brockdorff-Rantzau, the Minister of Foreign Affairs, is reported to have said:

Freedom of trade, however, presupposes freedom of the seas, and that is why the point in the Wilsonian program, which speaks of the freedom of the seas, is one of the most important for Germany. In this respect it is of much less importance for us what the rules of naval warfare happen to be. We will not speak now of new wars, but rather of the peaceful use of the sea routes, their coasts and their ports. Regarding this main point of the future peace conditions there is as yet no clarity. The Entente, last autumn, reserved its approval to this, and the conditions which they have drawn up to place before Germany in connection with the promise of the delivery of foodstuffs and with the prolongation of the armistice lead it to be feared that they are desirous of robbing Germany of the whole of her mercantile fleet. What, however, does freedom of the seas represent for us if we have no ships to sail upon them? How can we bring our importations and exportations into line with our economic requirements if, for this purpose, we have only foreign tonnage to use, which may possibly be only unwillingly lent to us by other nations at profiteering prices. If it be desired to compel Germany, without a mercantile fleet, to enter the League of Nations, this would represent a violent subversion of her economic development, and such a thing could not be done without cramping convulsions which would continually constitute a threat to general peace.<sup>10</sup>

The German scheme for a League of Nations, drawn up by a German Society of International Law and submitted to the German Government with the proposal that it be used as a basis for peace negotiations, also contains provisions intended to secure "freedom of movement and trade" on the high seas, as well as on waterways, roads and railways, and in the air.<sup>11</sup>

<sup>10</sup> See *London Times*, February 17, 1919, p. 9.

<sup>11</sup> See *infra*, p. 217.

Among the authorities on international law, the leading advocate of the principle of internationalization as applied to the high seas and international waterways appears to be Walter Schücking, Professor of International Law at the University of Marburg. Professor Schücking proposes the following "radical solution" of the problem of the freedom of the seas:

As the final basis of all difficulties, we realize at the outset the absence of a state regulation of the sea. Because in the past the fundamental principles of the free seas have been applied in effect in a purely negative way, in that the sea never recognized a master; only by reason of the absence of any state regulation of the sea is it possible to use the open sea as a theatre of war, to use permissible or prohibited means of warfare that may result in a complete stoppage of neutral shipping. If, however, we want to win real freedom, then there is no other way but to institute a supremacy. . . . True freedom on the seas can only be established by organizing a supremacy, the supremacy not of one, but of the totality of all States. It is necessary to establish an *imperium* over the sea, and none can doubt its possibility. Since we experience today how one nation, like England, can exercise a real tyranny on the sea, how much less would the nature of the fleeting waves or the extent of the sea be an obstruction to the establishment of a supremacy of the sea by the League of Nations, as was plainly seen to be developing out of the Confederacy of Nations at the Hague Conferences? Whoever considers this fantastic, let his attention be called to the fact that already previous international law had developed the idea of an international police power at sea for certain common tasks of seafaring states. That was true in the fighting of piracy, in the slave trade, control of the North Sea Fisheries, the protection of the underseas telegraphic cable, and the fight against the trade in brandy in the North Sea. It is only necessary to develop these tendencies. Instead of collective agreements, as usually concluded between a majority of States for stated purposes, we must make use of the universal treaty in which the whole civilized world is interested: instead of single parts of the seas placed under international control, we must put all the seas of the world under such control; instead of a merely particular police regulation, for example, the struggle against slave traffic at sea, the international sea police must be used for the general police purpose of repressing any violation committed by any one nation upon the sea. With this object in view, the international character of the sea territory must be established. The sea should be placed under the organized supremacy of all for the free use of all. Then the law of prize, of contraband and blockade, danger zones, and all substitutes of such means of warfare could be done away with. The best logic would require that in case of

a war at sea, no battle should be permitted upon this international sea territory, except when such action between two nations takes place within such territorial or coastal limits as legally belong to them or within limits analogous to the situation on land. If one does not wish to go that far, those highways for international trade upon which depend the great sea traffic between continents must be made unconditionally secure. And since, between nations, right, unsupported by might, is as valueless as might unsupported by right, the carrying out of this legal régime would have to be insured by means of an international sea police, as was meritoriously proposed before the World War by the London Professor of International Law, Von Vollenhoven. Where hitherto the policing of the sea has been exercised in common, this has actually happened, inasmuch as the states had mutually yielded certain privileges to their warships, even with respect to vessels under a foreign flag. For the future, we need an international sea police that is international in its organization. It must be built upon the system of a single-nation contingent, which will be governed by an international command; and it must be seen, too, that no single nation should maintain a separate fleet which is stronger than that of the international police. Thus this program of organization of an international sea police stands in close connection with the demand for an international limitation of armament at sea. That it is possible to have an international military executive has been proved. To show that we have had them in the past, I need only recall the China campaign against the Boxer uprising, or the joint march of the Great Powers against a stronghold of the Montenegrins in Albanian Skutari during the Balkan wars.

Excepted from internationalization would be naturally the coastal waters, which even today lie under the territorial powers of the coast state. But when it comes to the straits that are necessary for international sea traffic, and are not, like the canal between the North Sea and the Baltic, of primary importance in national strategy, such straits and canals should be completely internationalized. National coast fortifications, which are not used for the defense of their own country, but are used only to exercise a supremacy over sea-routes that are indispensable, like the one of Gibraltar, should be razed. It is different in regard to the Bosphorus, because the Turkish capital must be protected from an attack by sea; but here also the assurance of the coast state must be given to the shipping interests of neutrals, so that an absolute bar against neutral commercial ships cannot be maintained when Turkey becomes involved in war. The Suez and Panama Canals must be duly internationalized by the stationing at those places of an international sea police. In regard to the Panama Canal, it will be shown, if and how far the United States are willing to sacrifice something themselves, when it behooves them, according to the program of the President, to subordinate the interests of national power to the peace interests of humanity. As mentioned pre-

viously, if it is necessary to station an international fleet police at all international straits and canals sufficient for their protection, there must, in addition, be available an organized international fleet which, upon decision of an international Hague authority, can go forth to punish anyone who has violated the freedom of the seas.<sup>12</sup>

Between the two extreme schools of the believers in sea-power and the internationalists, there are a few German authorities, like Schultze-Gaevernitz and Stier-Somlo, for example, who profess to believe that the freedom of the seas can best be attained and preserved by a balance of sea-power between the leading maritime nations. They deny that Germany has been aiming at a domination of the seas, and maintain that she merely wishes to take her rightful place among the great sea Powers. Thus, Schultze-Gaevernitz:

Germany is fighting for freedom of the seas, consequently for humanity, yea, even for France! Germany does not aspire for herself to a naval preponderance which, anyhow, she would not be strong enough to maintain, but to a balance among several naval Powers in which she would have rights and an influence equal to those of the strongest Power. On this condition (but on this only, which alone is capable of insuring the existence of her posterity), Germany does not even at this day reject all idea of disarmament.<sup>13</sup>

We have hitherto considered the various schools or points of view in Germany regarding the best *means* or methods of obtaining and preserving the much-desired freedom of the seas. Let us now try to determine the real meaning which Germans attach to this phrase.

German authorities and representatives of German opinion of all schools appear to be in substantial agreement as to the meaning or real purpose of this freedom so far as Germany is concerned, though they differ widely as to the degree of freedom which it is possible to attain. In general, they make little pretense of humanitarian or idealistic aims, although the claim is occasionally put forward that they are acting in the interests of "humanity" or of "mankind."

Whether the thought is fully expressed or not, to the average

<sup>12</sup> See *Der Bund der Völker*, 1918, pp. 149-155.

<sup>13</sup> See pamphlet by Schultze-Gaevernitz, entitled *Frei Meere*, 1915. For the views of Stier-Somlo, see his pamphlet (1917) entitled *Die Freiheit der Meere und das Völkerrecht*, pp. 119 ff.

German publicist the freedom of the seas means, not merely freedom of navigation, but essentially freedom to trade with, and even to penetrate into, the various countries and regions where Germans may desire to trade or settle. In other words, it includes the idea of the open door on equal terms with other nations, and implies freedom, if not control, of such means of communication as submarine cable lines, wireless telegraphy stations, news agencies and the like. Herr Dernburg, for instance, has expressed the idea that it includes equality of treatment in the matter of customs duties, and he even goes so far as to suggest that preferential treatment of the motherland by its colonies would constitute a violation of the principle of the freedom of the seas:

A free sea is useless unless combined with the freedom of cable and mail communications with all countries, whether belligerent or not. I should like to see all the cables jointly owned by the interested nations, and a world mail system oversea established by common consent. But, more than this, an open sea demands an open policy. This means that, while every nation must have the right, for commercial and fiscal purposes, to impose whatever duties it thinks fit, these duties must be equal for all exports and imports for whatever destination and from whatever source. It would be tantamount to world empire, in fact, if a country owning a large part of the globe could make discriminative duties between the motherland and dominions or colonies as against other nations.<sup>14</sup>

Either in the foreground or in the background of the German discussion of this subject, there is always the expressed or unexpressed desire for free raw material with which to feed the German factories, as well as of markets for the sale of the products of these factories. The internationalist and erstwhile propagandist Dernburg, who perhaps expresses this German purpose most fully, has even suggested that it might be necessary after this war for Germany to force herself into these markets for the purpose of purchasing raw material.

Our answer can only be this: The Central Powers are fighting for their integrity and capability of development, and, since they are industrial nations, this implies unimpaired imports at all times; that is what we commonly understand by the expression, "freedom of the seas."

<sup>14</sup> Letter of Herr Dernburg, April 17, 1915, *op. cit.*

The supply of raw material must be a peace condition. He remarks on this, head:

A peace that does not provide for this in a practical manner is not a peace that the Central Powers can conclude, and they will not conclude it unless the Entente can give us the knock-out blow.

When peace comes, then one of the most important points for the Central Powers must be the opening and keeping open of the export markets and those for materials. The freedom of the seas must be attained.<sup>15</sup>

In a very significant address delivered at Stuttgart on September 12, 1918, the then Vice-Chancellor von Payer is reported to have said:

We desire a disarmament agreement on the condition of complete reciprocity, applied not merely to land armies, but even to naval forces. In pursuance of the same idea and even going beyond it, we will raise in the negotiations a demand for freedom of sea-routes, for the open door in all overseas possessions, and for the protection of private property at sea. And if negotiations take place regarding the protection of small nations and national minorities in individual states, we shall willingly advocate international arrangements which will act for deliverance in countries under Great Britain's dominions.<sup>16</sup>

Erzberger's Draft Constitution of a League of Nations, referred to above, includes the following provisions on "Economic Equality."

The constitution further provides for economic equality and the principle of the open door, all the members of the League granting each other the most-favored nation treatment.

For the first ten years after the formation of the League, each State's surplus of raw materials will be divided between the other Federal States according to a standard to be agreed upon on the basis of their respective imports of the year 1913, and the special needs of individual States arising out of the war.

The scheme for a League of Nations, drawn up by a German Society of International Law, contains the following suggestive provisions bearing on "Freedom of Movement and Trade":

23. The seas and canals and straits connecting the seas are open

<sup>15</sup> Extracts and abstracts of an article in *The New Europe* for June 27, 1918, entitled "Herr Dernburg's Economic Outlook." This article is based on an article of Dernburg's in the *Neue Freie Presse* for May 19, 1918, on "Wilson's Raw Materials Boycott vs. the United States."

<sup>16</sup> See N. Y. *Times Current History*, October, 1918, pp. 69-70.

alike to the ships of all the States belonging to the League of Nations. No League of Nations State shall treat seagoing ships and cargoes of other League of Nations States less favorably than its own. To secure this principle international shipping commissions shall be established at great ports with a mixed population.

24. Every subject of a League of Nations State has the right to use the roads and railways of all League of Nations States for transit traffic with his own means of transport.

25. The air is open to the aircraft of all League of Nations States alike.

26. The subjects of League of Nations States must be put on an equality with the native inhabitants of every League of Nations State as regards personal freedom and domicile, religious freedom, protection by police and courts, acquisition of landed property, copyrights and patent rights, and freedom of entry and exit. The subjects of League of Nations States must not in any League of Nations State be required to pay higher taxes or dues of any kind than native inhabitants.

27. In every League of Nations State the subjects of the other League of Nations States must be treated equally. This applies especially to freedom of settlement and trade, taxes, and other dues, and admission to the use of educational establishments and other cultural institutions.

28. The League of Nations States mutually guarantee economic equality, and bind themselves to friendly cultivation of their economic and politico-commercial relations.

29. The League of Nations States mutually guarantee to one another commercial and fiscal most-favored treatment: this implies that every favor which is granted to another League of Nations State, or to a State which does not belong to the League, is granted unconditionally and unreservedly to all other League of Nations States.

30. Vetoes or restrictions upon import and transit are forbidden. Vetoes upon exports may be applied only to food and fodder. If they are applied in Dominions (sic), Colonies, Crown Colonies, or Protectorates, they apply also to the Mother Country.

31. The provisions of Clauses 23, 24, 25, 26, 27, and 30 do not exclude measures of safety, health, and policing of traffic in the individual League of Nations States.<sup>17</sup>

An interesting and able attempt to give a pseudo-scientific, or "wissenschaftliche," basis to this extension of the doctrine of the freedom of the seas so as to make it include "freedom of movement and trade" or the "open door," is made by Professor Christian Meurer,

<sup>17</sup> See *London Times*, February 3, 1919, p. 9.

of the University of Würzburg, in a pamphlet entitled *Das Program der Meeresfreiheit*, published early in 1918.

In order to do full justice to Meurer's argument, it is necessary to quote at some length:

Freedom of the sea means above all freedom of navigation, of fishing, and of laying cables on the high sea. The center of gravity lies in the freedom of navigation. And in this connection it must be emphasized in accordance with Roman law: It is not sufficient that every man and nation may travel on the sea, they must likewise be able to effect a landing.

But a powerful obstacle has arisen here lately; the harbor is actually regarded as a part of the mainland, and the public use of the coast, legal according to Roman law, is replaced today by the sovereignty of the coast state with its attending legal power to close the port.

Against this there exists but one remedy. Since time immemorial international intercourse had to reckon with obstacles on the part of states that were overcome, first, in a simple though unequal matter-of-fact way; next, through a more or less consistent though firmly established usage, and, finally, through treaties between states. Consequently, a general agreement is needed that would reconcile territorial sovereignty with the demand for the freedom of the sea and which would effect the operation of the latter through a lasting charge of the former.

Freedom of the seas without the basic right to the utilization of coasts and ports is a contradiction in *ajecto*. Freedom of the seas endeavors to turn the seas into roads of communication for mankind and to grant the opportunity for oversea trade and commerce. And this purpose asserts itself especially and in most conspicuous manner in all landing-places. A freedom of the sea that limits vessels to voyages forth and back on the high sea and at the same time closes the ports to them, would be perfectly aimless. The sea would eventually become the natural graveyard for vessels.

If the principle of the freedom of the sea or the doctrine of "common property" (*commune omnium*) are not eventually to resolve themselves into an empty principle, as far as ships are concerned, then they must under no circumstances be left to the arbitrary will of the local state authorities. If the seas are to remain the highways of international traffic, then the demand for the entrance of a ship into foreign ports must be made possible as a matter of principle.<sup>18</sup>

<sup>18</sup> See Meurer, *Das Program*, etc., pp. 10, ff.



As has been said, German authorities and publicists, while agreeing as to their main purpose or the real meaning of the freedom of the seas for Germany, are either vague or differ widely when it comes to the question of a practical program. While some of them admit in so many words that in times of peace the seas are free and open to all, others complain that Germany is hampered and restricted in various ways. They complain of a lack of adequate press, postal and telegraph facilities, the want of good harbors, coaling stations, etc., but they are vague in their specification of concrete grievances.

To the dominant school in Germany, freedom of the seas has evidently meant freedom from supposed British tyranny or oppression at sea, and the substitution therefor of German control. Though there is a lack of specific allegations, England is constantly referred to as the tyrant or "vampire" of the seas. Nevertheless, it is evident throughout that this "tyrant" is to serve Germany as a model in her future course of action, once the "trident" is grasped by her hands.

Then, too, the potential power of the British navy seems ever present to the German mind, even in times of peace. To the fear-inspired German, back of the rock of Gibraltar, at Malta, in the Suez Canal, at Aden, at Singapore, and in the harbor of Hongkong, crouches the British lion ever ready to spring upon his prey.

As we have seen, in times of peace, by freedom of the seas Germany has virtually meant the open door or freedom of movement and trade (for herself) all over the wide world, with a view primarily of securing markets and free raw material which it was somehow imagined would follow in the wake of the destruction of the supposed British tyranny of the seas. In time of war, Germany has, in general, favored a maximum of freedom from the exercise of belligerent maritime rights, more particularly immunity from the capture of private unoffending enemy property at sea. During recent years, especially, there has been a considerable advocacy of such a program, not uninfluenced, it is believed, by the prospect of a future conflict with Great Britain. As some evidence of this might be mentioned the fact that the publication of Lord Loreburn's book on *Capture at Sea* in 1913 was received with a hearty welcome and translated into German by no less an authority than Niemeyer.

But when it comes to an actual or practicable program, there is no agreement among the recent German authorities in respect to maritime law. In general, they seem to agree in denouncing the "unholy trinity" of Niemeyer or the "keyboards" of Triepel,<sup>19</sup> but disagree when it comes to details. Indeed, they are not in entire harmony upon basic principles, though for the most part they appear to see clearly what may be regarded as the fundamental condition of the problem, namely, that all belligerent sea rights hang together, and should not be dealt with separately. Whether voted up or voted down, they should be treated as an entire program or unit. Thus, contraband should not be treated without reference to blockade, or the capture of private enemy property at sea without reference to contraband. Each furnishes a series of loopholes through which maritime states can assert belligerent powers at sea even if debarred from the use of other avenues of attack.

As illustrative of the divergencies of opinion among German authorities in this matter, the following examples may be cited: Niemeyer, Perels and Schramm favor an unrestricted use of all proper means of sea warfare. Meurer, Wehberg and Schücking desire the

<sup>19</sup> I.e., the rights of the capture of prizes, blockade and contraband.

The following passages from Niemeyer and Triepel may serve to illustrate the text:

"If we wish to be honest, then we must admit that the main purpose of our regulations does not lie in the restrictions imposed by the [Paris] Declaration upon the arbitrary will of war, but in the recognition accorded to exorbitant war privileges. These privileges find their highest expression in the following unholy trinity: right of capture at sea, right of contraband and right of blockade. The right of capture at sea sanctions the brutal treatment of private property; the rights of contraband and of blockade accord the same treatment to neutral commerce. The restrictions contained in the Declaration consist in reality in the exclusion of privateering, in the immunity of enemy goods on neutral vessels, and in the demand for effective blockades."—Niemeyer, *Die Prinzipien des Seekriegsrechts*, 1909, p. 15.

"Capture at sea, contraband and blockade are like three keyboards of an instrument on any of which one may play at will in order always to produce the same sound.

"If necessary, contraband may be given up, if blockade be kept. And one may drop blockade as well as capture at sea, if contraband remains."—Triepel, *Die Freiheit des Meeres*, 1917, p. 35.

For a fuller exposition of Triepel's views, see note at the end of this article.

abolition of the right of the capture of private enemy property, together with the abolition or serious restrictions upon blockade and the capture of contraband. Triepel and Stier-Somlo, while apparently looking upon these practices as evil, regard the demand for their abolition as Utopian.

When it comes to questions of the abolition or restrictions of the rights of contraband and blockade, there is the same variety and diversity of opinion among German authorities on maritime law. Perhaps the views of Meurer<sup>20</sup> may be regarded as more or less typical and representative, though it cannot be said that the authorities are agreed on any point.

Meurer favors not only the abolition of the right of capture of enemy prizes,<sup>21</sup> but he expressly advocates the abolition of commercial blockade,<sup>22</sup> and he unreservedly condemns the doctrine of continuous

<sup>20</sup> As expressed in his pamphlet entitled, *Das Program der Meeresfreiheit*, 1918, *passim*.

<sup>21</sup> In reply to the question, "Shall Germany contend for the abolition of the right of capture at sea, or, as an alternative, consent to it?" Meurer (*Das Program*, etc., p. 49) answers: "Yes, provided a satisfactory and simultaneous regulation of the rights of blockade and contraband shall take place excluding a reappearance of the right of capture at sea in a different form. For the whole world is agreed that there exists a connection between these rights, and knows well that these questions ought not to be segregated by means of waterproof bulkheads."

<sup>22</sup> Speaking of commercial blockade, Meurer (*op. cit.*, p. 60) says: "The core of the right of blockade is rotten; the right of blockade is a defiance of neutrality; it is the legal form for brutal acts of violation against neutrals and their trade. Commercial blockade originated at a time when the principle of neutrality was not yet developed, and when a belligerent was the leviathan who swallowed everything in sight. It is high time that the principle of neutrality should begin to assert its natural rights. The belligerent presses the neutral nations into his service by blockading commercial intercourse, and he injures them by placing restrictions upon their trade. The practice of confiscation lends emphasis to the application of blockade, and thus the right of capture at sea and the right of blockade pull on the same string; both constitute rights of capture. The belligerent lays his hands upon private property, in one case in the possession of enemy subjects, in the other, even on the property of neutrals. It is the same spirit, only somewhat more brutal, in the case of blockade, because it is directed even against neutral nations. For that reason whoever is in favor of the abolition of the right of capture at sea can no longer defend the right of blockade."

voyage.<sup>23</sup> But he appears to regard the abolition of contraband as impractical. •

On this head, Meurer says:

My plan demands, furthermore, that the idea of conditional contraband disappear entirely from international law. While according to my proposal, all articles needed in warfare, hence the objects which hitherto constituted absolute contraband, can no longer be transported nor shipped in transit, and while the sovereign who fails in his supervisory duties renders himself liable to a breach of neutrality, for which he may be brought to account through diplomatic channels, commerce is to remain absolutely unrestricted in all other respects. It is easily perceived that the stakes involved in the control of war shipments are not too high; the sea becomes really free.

Kleen's plan, too, which was fully discussed in the preceding pages, is in agreement with my own views. He wants to prohibit only the shipment of "actual war munitions" (*munitions de guerre proprement dites*) as constituting the chief articles of military aid. Kleen was of the opinion that it was not advisable to stamp as contraband and to prohibit by means of a contraband law the sale of such articles as were required too much in the course of daily life. According to paragraph 9 of his proposal, the Powers were to come to an agreement concerning a general international convention that would cover only objects of so-called absolute contraband, and likewise any changes in the contraband list that might eventually be required on account of inventions, progress in the art of warfare, or new international principles. For that reason, Kleen, whose far-seeing mind already perceived, as it were, the Hague Peace Conferences, had in view alternating revisions of the lists at periodically convoked conferences. He expressed himself strongly against contraband declarations being issued by the belligerents; these, in his opinion, were never determined by considerations of the general, but invariably of selfish, interests.<sup>24</sup>

Furthermore, Meurer is of the opinion that international law should impose upon neutral governments the obligation of preventing the shipment of absolute contraband. He strongly favors an international agreement prohibiting the exportation of arms. He cites in support of this view such authorities as Woolsey, Bulmerincq and Kleen; and, as shown in the above citation, endorses Kleen's plan of

<sup>23</sup> The theory of continuous voyage, Meurer (*op. cit.*, p. 65) characterizes as a "bluff for the purpose of covering up one's weakness through an artificially created fear among neutral nations."

<sup>24</sup> Meurer, *Das Program der Meersfreiheit*, 1917, pp. 86-87.

1893—a plan which was rejected by the Institute of International Law. He says (p. 89): “The spirit of true impartiality can assert itself freely only through an international embargo against exportation of articles that constitute absolute contraband.”

In respect to conditional contraband, Meurer (pp. 91, ff.) proposes that the conception be altogether abandoned by international law, that is, he favors absolute freedom of trade in conditional contraband. (It appears that on land Germany is to act in accordance with the law of military necessity; at sea this law does not apply. There is to be one law for land, and another for sea warfare.)

Meurer does not think much of the plan of an international maritime police force as a means of securing the observance of the freedom of the seas, but rather favors the economic boycott. He looks to the neutral community of nations to achieve this result. Should they fail, there remains the right of self-help. He thinks an international agreement could not make matters worse for Germany, but anticipates improved conditions for her after the war through the demonstrated success of the submarine, though he is honest enough to admit that German mastery would also mean the destruction of the freedom of the seas. Meurer concludes that the most effective safeguard of the freedom of the seas is eventually—not an international agreement, but the absolute certainty that all fresh ambitions for world dominance will be dashed to pieces against the Concert of Powers that will act as guardian of the seas.

There appears to be in Germany at the present time a strong current flowing in the direction of the abolition, or at least the limitation, of belligerent rights at sea under the guarantee of a League of Nations. In other words, under a socialistic or semi-socialistic régime, there is naturally a growing demand for a so-called neutralization or internationalization of the high seas and all international passage-ways.

Whether such schemes be looked upon as practicable or merely desirable but Utopian, whether regarded from the national or international point of view, the writer is convinced that belligerent rights at sea should not be surrendered lightly. They are all of one piece, and their preservation as a whole is certainly desirable from the

standpoint of a nation which is destined to be one of the Great Sea Powers of the world. But their preservation is no less desirable from the point of view of those who believe that the peace of the world and the freedom of the seas can best be secured and maintained through international action.<sup>25</sup>

AMOS S. HERSHEY.

<sup>25</sup> In his pamphlet entitled *Freiheit der Meere und der Künftige Friedensschluss*, published in 1917, the German publicist Triepel sets up the following thesis:

"The complete doing away of the rights of contraband and blockade is a Utopia. The abolition of the right of capture of prizes, without at the same time doing away with the rights of contraband and of blockade, would be not only a futile innovation, but one decidedly injurious to Germany. For the rights of capture, contraband and blockade are three fetters of maritime trade so ingeniously welded together, that as soon as one is loosened or destroyed the other lays hold so much the more firmly."

"Triepel dedicates to the proving of this thesis more detailed explanations. He tries to show that, in the first place, there is not the least prospect that the institution of contraband will ever disappear from the law of warfare. If the right of capture should be abolished but that of contraband be retained, then the conception of contraband, which up to the present has referred only to neutral property, would be applied also to that of the enemy. This enemy property would then fall a prey to the opponent, not as booty but as contraband. There would then arise the danger that by the great extension of the idea of contraband sea-booey might again be introduced, by means of which the maritime commerce of the enemy could be crippled just as much as by the right of capture. The abolition of the right of capturing prizes, without the abolition of the right of declaring contraband, would be advantageous to the sea-power which could manipulate the weapon of the capture of contraband goods the more readily. As long as the geographical situation and the proportions of power have not changed, Germany will derive more harm than benefit from such a freedom of the seas. The prospects for an abolition of blockade are just as slight. If, moreover, the right to capture prizes should be abolished but not that of blockade, the result would be ineffectual. For blockade would then signify to the adversary nothing else than capture. Ships would fall a prey to the enemy either as prizes or as blockade-runners. The blockade would destroy the enemy's commerce by its very existence. Therefore a blockading sea-power could, if necessary, dispense with the right of capture, for one military measure could be substituted for another. The abolition of the right of capturing prizes would have to be followed, as a logical conclusion, by the abolition of the right of blockade. In England the correct deduction was made that, because they could not dispense with blockade, neither could they with the capturing of prizes. At any rate, the retention of the right of blockade would make the abolition of the right of capture an illusion. On the other hand, the abolition of the right of blockade with the retention of the right of capture would not have the least advantage for Germany. Yes, even if both institutions

should be abolished, there would be no gain; for at once sharper emphasis would be laid upon other means of warfare, upon substitutes for blockade. The suppression of the introduction of contraband goods might very successfully replace blockade; even the mere prohibition of the right to import contraband goods might operate as a blockade. The same effect might be attained by the extension of the conception of contraband; likewise by the obliteration of the distinction between absolute and relative contraband. At any rate, the abolition of blockade could without the least difficulty be rendered ineffectual by the energetic application of the right to declare contraband. The problem would work out just as in the case of trying to abolish the capture of prizes. Capture, contraband, and blockade are like the three keyboards of an instrument, on any one of which one can at pleasure play the same melody. If necessary, contraband could be renounced if it were permitted to retain blockade; both blockade and capture could be given up if contraband remained. A renunciation of the capture of prizes is, therefore, according to Triepel, only possible if both blockade and contraband are abolished without leaving either a trace or a substitute. And that, he says, is impossible of realization. Substitutes for the one or the other would always be present. Moreover, Triepel does not lose sight of the possibility that England in a future naval war might be more vulnerable than it has so far been. In that case the Germans would be fools if they should rob themselves of the right of capture and of blockade. Consequently, Triepel comes to the conclusion that the abolition of the right of capture would bring Germany no advantage, but perhaps also no detriment.' Citation from Nippold, *Die Gestaltung des Völkerrechts nach dem Weltkriege*, 1917, pp. 279-281.

I was unfortunately unable to procure a copy of Triepel's important pamphlet in time for the preparation of this article.

## THE NEUTRALITY OF SWITZERLAND

### IV

#### THE GOVERNMENT AND THE WAR (*Concluded*)

It has been finely said of Switzerland that while the present war has demonstrated in a sinister manner Swiss dependence upon its powerful neighbors for fuel and food, and thus for its very existence, nevertheless neither these neighbors nor the world at large could for a moment spare the example of heroism and devotion so constantly and consistently set by the Swiss nation in its political and social life. This quality of devotion has been illustrated during the war not alone by the struggles unavoidable in the maintenance of neutrality, but also in the far-reaching activities of the International Red Cross at Geneva. Indeed, the work accomplished through the agencies of this wonderful organization in the internment and care of wounded soldiers and their repatriation where permissible under belligerent agreement, in the repatriation of civilians driven from occupied territory, the transmission of mail to prisoners, and the discovery of vast numbers of the missing, constitute one of the most striking chapters in the war's history.

No feature of the Red Cross work is more worthy of study than the Bureau of Information established at Geneva (*Bureau de Renseignements sur les prisonniers de guerre*), and which is the issue of an interesting development. The earlier conceptions of Red Cross activities had the sick and wounded alone in view. At the first it was thought that the interests of interned prisoners might be safely left to the various national Red Cross societies, but the vast exigencies born of the present conflict have amply confirmed the foresight of provisions made at the Hague Conferences of 1899 and 1907, and which sought a distinctly international scope if adequate work was to be done. A nearly contemporaneous line of thought is seen in



the views expressed at St. Petersburg in 1902 and London in 1907. At St. Petersburg it was moved by Renault that the national societies consider the feasibility of extending their work to comprise *prisoners* as well as the wounded, with the result that the eighth Red Cross Congress, held at London in 1907, resolved, on motion of de Senonges, representing the French Red Cross, that prisoners of war be brought within the responsibilities of the organization and that the international committee at Geneva be recognized as the medium of intercommunication. Finally, the ninth Congress, held at Washington in 1912, recorded the *vœu* that a special commission act in concert with the International Red Cross at Geneva for the relief of prisoners of war:

Le Comité International par l'intermédiaire de délégués neutres accrédités auprès des gouvernements intéressés assurera la distribution des secours qui seront destinés à des prisonniers désignés individuellement et répartira les autres dons entre les différents dépôts de prisonniers, en tenant compte des intentions des donateurs, des besoins des captifs et des instructions des autorités militaires. Les frais occasionnés ainsi au Comité International seront supportés par les Sociétés de la Croix Rouge intéressées. Les Commissions spéciales pour les prisonniers de guerre se mettront en rapport avec le Comité international à Genève.

Such are the beginnings of the present-day central agency at Geneva which responds completely to the spirit of the Hague Regulations as recorded in Article 14 of the Annex to the Convention of 1907 Respecting the Laws and Customs of War on Land, the Annex being termed *Règlement Concernant les Lois et Coutumes de la Guerre sur Terre*. In the English translation, published by the Carnegie Endowment for International Peace, Article 14 reads as follows (italics representing changes of 1907).

An inquiry office for prisoners of war is instituted on the commencement of hostilities in each of the belligerent States, and, when necessary, in neutral countries which have received belligerents in their territory. It is the function of this office to reply to all inquiries about the prisoners. It receives from the various services concerned full information respecting internments and transfers, *releases on parole, exchanges, escapes*, admissions into hospital, deaths, as well as other information necessary to enable it to *make out and keep up to*

date an individual return for each prisoner of war. *The office must state in this return the regimental number, name and surname, age, place of origin, rank, unit, wounds, date and place of capture, internment, wounding, and death, as well as any observations of a special character. The individual return shall be sent to the Government of the other belligerent after the conclusion of peace.*

It is likewise the function of the inquiry office to receive and collect all objects of personal use, valuables, letters, etc., found on the field of battle or left by prisoners who have *been released on parole, or exchanged, or who have escaped*, or died in hospitals or ambulances, and to forward them to those concerned.

On August 4, 1918, the Swiss Red Cross issued a general appeal signed by its president, Iselin, of Basel, a member of the National Council, and by leading citizens of other cantons, and the Federal Council also freely lent the resources of the central government to the practical administration of relief work; nor did the various national information bureaus fail in cooperation with the Swiss Red Cross through the International Committee at Geneva, of which Ador, President of the Confederation, is president; as he is also president of the Geneva Bureau of Information.

August 15, 1914, the International Committee at Geneva requested the various Red Cross societies to institute special commissions for the care of prisoners, and notified them, as it also notified the press and the Swiss Government, as well as the various foreign consulates at Geneva, that an international agency of relief and information for prisoners of war had been instituted. Basing itself on the Hague Convention above cited, and on the Universal Postal Convention of 1906, the committee requested free carriage (*franchise de port*) for its various materials. From every side favorable replies were received, and thenceforward and on a scale of increasing magnitude, letters, money orders and parcels were carried free. So rapidly did the work grow that the agency found itself obliged to remove its quarters from the home of the International Committee to the beautiful Palais Eynard, built and owned by the city of Geneva with an endowment bequeathed by the celebrated Swiss Secretary at the Congress of Vienna. At the present moment additional quarters have been secured to shelter portions of the agency's extensive work. Its

personnel rose to above 1,200 in number. The great majority, however, of these workers gave their services without pecuniary reward. The wide range of the agency's activities may be gathered from the fact that by December, 1914, the agency handled on an average some 15,000 letters and parcels daily. Many volumes might be devoted to an account of the labors accomplished by these organizations; but space will not allow us to dwell further upon them. We turn, then, to consider in brief outline some political activities of the Federal Council.

In the Swiss polity, executive functions are confided, not to a single person, but to a council of seven (*Conseil Fédéral, Bundesrat*) chosen for a term of three years by the two Houses of Parliament in joint session (*Assemblée Fédérale, Bundesversammlung*). The Council's chairman, annually elected by the Assembly at its December meeting, is the President of the Confederation, though beyond the privileges of chairmanship and the prestige of the title, he has no special duties or prerogatives apart from membership in the Executive Council. The conduct of foreign affairs, by virtue of a Council resolution adopted June 26, 1918, is in charge of the President as Chief of the Council's Political Department. For the present year (1919) the Council's committee on foreign affairs (*Délégation du Conseil Fédéral pour les Affaires Étrangères*) is formed of the President, Ador, the Vice-President of the Council, Motta (who was President in 1915), Schulthess (President in 1917), and Calonder (President in 1918), who was Chief of the Political Department last year.

Parliament is formed of two councils, the National Council (*Conseil National, Nationalrat*) and the States' Council (*Conseil des États, Ständerat*). The National Council has at the present time 189 members, chosen in 51 election districts (*arrondissements*). Seventeen cantons form each a single election district. The remaining eight cantons are divided to form the 34 other election districts. While up to the present time the deputies have been chosen on the majority principle familiar in the United States, nevertheless on October 13th last an amendment to the Federal Constitution was adopted by popular vote, in pursuance of which during the coming spring federal

elections will be held upon the principle of proportional representation, each of the 25 cantons forming a single election district.

Seven of the cantons (Schaffhausen, Zug, Glaris, the two Appenzells (Inner and Outer) Uri, and the two Unterwaldens (Upper and Lower) elect no more than one or two deputies each. No one of these, consequently, will fall properly within the change of principle contemplated by the new amendment until their population so increases as to enable them to elect at least three deputies. It is not expected, indeed, that any serious dislocation of the electoral machinery will take place under the new plan. For some time past Canton Grisons has elected its own Council of State and its delegation to the National Council in an election district comprising the entire canton, which is geographically the largest of all the Swiss states. •

The Federal Council of States is composed of 44 members, the Constitution providing for two members from each whole canton. There are constitutionally 22 cantons in all, but since one of these was divided a half-century or more ago and two in the far past, Switzerland has at the present time, properly speaking, nineteen cantons and six half-cantons, and each one of these six half-cantons (Basel City, Rural Basel, Outer and Inner Appenzell, Upper and Lower Unterwalden) elects a member to the States' Council—that is to say, 19 cantons choose two each, making 38 delegates, and six half-cantons choose one each, completing the constitutional number of 44. The delegates are chosen, by constitutional permission, in such manner as each canton may direct. In practice, today, those cantons, Uri, Glaris, Appenzell, Outer and Inner, Unterwalden, Upper and Lower, which retain the ancient purely democratic or *Landsgemeinde* system of government, choose their delegates in these annual cantonal assemblies. In constitutional theory the two Houses of Parliament are clothed with equal powers, although the States' Council is supposed to preserve the ancient theory of an alliance of independent cantons for federal purposes, while the National Council in its source and structure objectifies the new Swiss nation with an increasingly centralized government.

Parliament holds two sessions annually, summer and winter, each of these being followed by a continuation session, and at each session there is usually a meeting of the two Houses for the granting of

pardons or (at the December session) for the election of the Federal Council every third year, the election of a president annually, the election of a chancellor every third year, and the election of 24 members and 9 alternates of the Federal Tribunal at Lausanne every sixth year, a presiding justice of this, the only federal court, being chosen by the National Assembly every second year.

The actual summoning of Parliament and the preparation of subjects for its consideration (*tractanda*) devolves upon the Federal Council. The supreme constitutional authority, nevertheless, resides with the two houses of Parliament, whose statutes and resolutions are not to be challenged, and have the force of final law with respect to the courts, although subject to a referendum demand unless declared *urgent*.

Such being Switzerland's governmental machinery when, in the last week of July, 1914, the war cloud burst over Europe, the Federal Council on Friday, July 31st, summoned by telegraph the members of Parliament to meet on the following Monday, August 3d, and, at the same time ordered a general mobilization of the citizen-army, this latter process being so exactly and swiftly carried out that on Monday afternoon more than 400,000 men, fully trained, armed, and equipped, were in readiness along the various frontiers to protect the country's integrity and neutrality. It is well to note here, in view of the subsequent immunity of Switzerland from invasion, that these citizen troops were known to be the best shots in Europe, and although taken directly from their ordinary avocations, the longest aggregate of military service (from the 20th to the 48th year) being 200 days, they were and are beyond question the equals of any soldiery in all that goes to make up the requirements of a modern army of defense.

Already before the Houses of Parliament had come together at ten o'clock on Monday morning, August 3d, the Federal Council issued a proclamation forbidding the export of foodstuffs and cattle, prohibited the employment of wireless telegraphy, save under strict government control, and prepared detailed messages to be laid before Parliament proposing the issue of five-franc bank-notes to relieve the drain of small silver, making national bank notes a legal tender,

and authorizing the Council to issue a general notification of neutrality addressed to the Powers. The Council asked furthermore that Parliament approve the mobilization and confer upon the Council authority to act at its own discretion with respect to all measures necessary to preserve the security, integrity, and neutrality of the country, to maintain its credit, and assure adequate supplies of food for the people. Said the Council:

Il ne peut avoir de doute sur l'attitude que la Suisse doit prendre dans ce conflit. La ligne de conduite politique que notre pays a librement choisie, la reconnaissance de notre neutralité inscrite dans des traités internationaux, enfin tout le cours de notre histoire ne permettent pas de douter que le bien de notre pays réside dans l'observation d'une complète neutralité.

Nous vous demandons de nous autoriser à notifier aux puissances étrangères cette décision de neutralité de la Confédération suisse. Toutes les mesures seront prises en vue d'assurer le respect et la stricte observation de cette neutralité. La neutralité, l'indépendance et l'intégrité de la patrie ont pour condition la ferme résolution de notre peuple de repousser par la force des armes toute attaque étrangère, d'où qu'elle vienne. Surs de cette puissante volonté du peuple suisse, nous avons mobilisé hier l'armée, élite, landwehr et partie du landstrum. Nous avons voulu par là, dès le premier jour, être en état d'opposer notre armée entière à toute tentative de violation de notre territoire. En évitant les demi-mesures, nous ne liions rien perdre des grands sacrifices que notre peuple a consentis depuis longtemps pour son armée et nous n'avons pas reculé devant la mise en ligne de l'ensemble de nos forces, parce qu'elle nous a paru être la seule mesure répondant à la situation.

Nous vous prions de donner votre approbation à la mobilization générale que nous avons ordonnée.

Le soin mis depuis des années à l'instruction de nos troupes, à leur armement, à leur équipement, à la préparation générale à la guerre nous donne la confiance que nous serons à la hauteur de la tâche qui nous incombe. Les mesures prises pour assurer l'approvisionnement de la population en pain nous sont un garant que nous pouvons, à vues humaines, aller sans crainte au-devant des événements.

Ce que seront ces événements, quelle extension prendra la guerre, quels Etats y seront impliqués, voila ce que personne ne saurait dire aujourd'hui. Mais nous prévoyons que nous aurons besoin de toute l'armée et de toute la force économique de la nation et nous devons vous demander de nous donner l'une et l'autre sans limite. Nous sommes conscients de la responsabilité qu'impose et de la confiance

que suppose cet octroi de pouvoirs et de crédits illimités. Nous sommes sûrs toutefois que vous n'hésitez pas, en cette heure grave, à nous donner et ces pouvoirs et ces crédits, dont nous ferons l'usage le plus consciencieux.

Nous avons la conviction que notre patrie, forte de l'union et de l'esprit de sacrifice de sa population, forte de sa préparation à la guerre et de l'esprits vaillant qui anime son armée fera face avec honneur à la sérieuse épreuve à laquelle elle est soumise.

Parliament being met in a session lasting but a few hours, promptly passed a series of ordinances accurately responsive to the requests of the Council, and having, in pursuance of the Constitution (Art. 85, sec. 4) which recognizes no *permanent* military officer of higher grade than colonel, elected Colonel Ulrich Wille General of the Swiss army adjourned. On only three preceding occasions, under the present national Constitution, has it been deemed necessary by the Federal Assembly to place a general in command of its army. The first of these occasions was on December 20, 1856, when Switzerland's integrity was threatened by Prussia, unwilling to relinquish its ancient and royal control of the little principality of Neuchâtel; nor did it yield to the inevitable until Dufour, elected General and at the head of 30,000 men, and, eventually, supported by Louis Napoleon, evinced Swiss determination to bring Neuchâtel wholly within the democratic federal circle. The second occasion was on May 2, 1859, when Dufour was again named General on the occasion of the rapid approach of Austrian troops toward the Swiss-Italian frontier and the brief but decisive campaign, of which the battles of Magenta and Solferino were the most famous conflicts, the horrors of the latter giving rise to the Red Cross. The third occasion arose in the Franco-Prussian War of July, 1870, when Colonel Herzog, of Canton Aargau, then artillery instructor-in-chief, was named General of the army of defense, Colonel Rodolph Paravicini, of Canton Basel, being the Chief of Staff. The ceremony of electing Colonel Wille as General on August 3, 1914, closed with the solemn taking of an oath in Parliament on the part of the newly elected officer.

In passing the highly important ordinance granting unlimited executive functions to the Federal Council, and thus freeing that body from constitutional limitations in its prosecution of measures

looking to national protection, the Federal Assembly declared its unswerving determination to maintain the country's neutrality during the war now imminent, approved the order of general mobilization, and said:

ART. 3. L'Assemblée fédérale donne pouvoir illimité au Conseil fédéral de prendre toutes les mesures nécessaires à la sécurité, l'intégrité et la neutralité de la Suisse, à sauvegarder le crédit et les intérêts économiques du pays et, en particulier à assurer l'alimentation publique.

ART. 4. A cet effet il est ouvert au Conseil fédéral un crédit illimité. Autorisation lui est en particulier donnée de contracter les emprunts nécessaires.

ART. 5. Le Conseil fédéral rendra compte à l'Assemblée fédérale dans sa plus prochaine session de l'emploi qu'il aura fait des pouvoirs illimités qui lui sont accordés.

ART. 6. Le présent arrêté, lequel est déclaré urgent, entre immédiatement en vigueur.

It will be noticed that in the concluding pages of the Assembly's decree, the decree itself is declared to be *urgent* and thus withdrawn from the control of any referendum petition. This is in pursuance of Article 89 of the Federal Constitution, which provides that decrees of a general character which are not *urgent* shall be submitted to the adoption or rejection of the people upon a demand made by 30,000 citizens.

The above proceedings having been taken by the two Houses in joint session, Parliament adjourned, leaving the conduct of the country in the hands of the Federal Council. On the following day the Council issued a preliminary ordinance touching the maintenance of Swiss neutrality, this neutrality, it was stated, comprising those portions of Savoy heretofore brought within the protection of Swiss neutralization. In replying to this declaration, the French Government announced its determination scrupulously to observe the treaties touching Swiss neutrality, but added that with respect to Savoy there appeared to be need of a further special agreement:

Quant à la zone de Savoie, dont la neutralité est prévue par les traités de 1815 et 1860, le Gouvernement de la République croit devoir rappeler au Gouvernement de la Confédération que les conditions de



l'intervention éventuelle de la Suisse en vue d'assurer cette neutralité devraient, d'après l'Acte d'acceptation du traité de Vienne en date du 12 août 1815, être l'objet d'un accord entre la France et la Suisse.

Replying to this communication, the Swiss minister at Paris declined to admit that a right to occupy Upper Savoy on the part of Switzerland depended in any manner upon a preliminary agreement between the two governments in view of the treaties and agreements of 1815.

In the end the point here under discussion failed to assume practical importance. Wounded prisoners and civilians seeking repatriation were, as has been already noticed, taken freely across Swiss and Savoy territory, the town of Evian on Lake Geneva being a principal point of transshipment on the long route from northern France through Geneva to the south or east. Nor was it found necessary to reach any more precise diplomatic settlement of the questions thought to be at issue, if indeed such questions could be properly said to exist under the treaties noticed in the earlier installments of the present article.

It should be noticed that, while Italy was not a signatory to the neutralization treaties of 1815, nor as yet, in 1914, a belligerent Power, it promptly announced, in replying to the Swiss declaration of neutrality, its determination to abide by the principles conceded by the other Powers in 1815:

Par note du 5 de ce mois, la Légation de Suisse à Rome a bien voulu porter à la connaissance du Ministère des Affaires Étrangères le texte de la déclaration de neutralité faite par la Confédération suisse en raison de l'état de guerre existant entre plusieurs Puissances européennes.

Le Gouvernement de Sa Majesté, en informant le sous-signé de ce qui précède, vient de le charger de déclarer au Conseil fédéral que, quoique l'Italie ne soit pas une des Puissances signataires de l'Acte du 20 novembre 1815, portant reconnaissance et garantie de la neutralité perpétuelle de la Suisse et de l'inviolabilité de son territoire, le Gouvernement du Roi s'est toujours inspiré des principes consacrés par cet Acte et est fermement résolu à observer cette attitude à l'avenir.

Early in the war it was determined by the Council to confine the conduct of the press within limits which would be consistent not only

with neutrality, but with due regard to the interior safety of the country. Accordingly, on August 10, 1914, the Council issued a general order touching censorship with regard to publications as to the number and movements of army units or other information tending to compromise the military situation. To the Army High Command was therefore assigned to a certain degree the faculty of press censorship with regard to military affairs. At the same time a Federal Press Commission was instituted composed of five members, two of these being nominated by the press itself, and three by the government, whose jurisdiction was to embrace not only the press proper, but also Swiss publications of every kind, and also imported printed material, the commission to notify the Council touching all transgressions of the rules or principles upon which it was established. The Commission of Press Control was formed under the presidency of Professor Roethlisperger, president of the *Bureau de repatriement des internées civiles* created by the Federal Council September 22, 1914; Diesbach, of the National Council; Professor Rochat, and Dr. Wolti, the two latter being nominated by the Swiss Press Association. The celebrated Professor Huber, who, at the outset, accepted the presidency of the commission, was subsequently, upon Roethlisperger's taking the presidency, replaced by Ringlier, former chancellor of the Confederation.

In no department of its activity, however, was the Federal Council called to exercise its patience and discretion in greater degree than in the economic field, although here its labors have been reflected in the measures subsequently taken by many other governments. But Switzerland's peculiar position geographically may be fairly said to have imposed upon the country many economic problems special to itself and not to be precisely paralleled elsewhere. Nevertheless it is worthy of notice that here the problems of food conservation, on the one hand, and of obtaining fuel and certain varieties of food products, on the other, were at times of the gravest character, and are not, even as these lines are being written, by any means happily adjusted. Mutual jealousies between the two belligerent parties led to the placing of importations under the watchful care of two high commissions—on the part of the Allies, the com-

mission was known as *Société Suisse de Surveillance Économique* (S. S. S.), and on the part of the Central Powers *Schweizerische Treuhandstelle* (S. T. S.).

The war had placed the country, as has been already mentioned, in a condition of extraordinary economic difficulty, a difficulty or a series of difficulties immensely enhanced by the fact that the opposing belligerents were determined to carry on a warfare of economic as well as of a military and naval character. Switzerland's position utterly forbade it to disregard either the wishes or necessities of either belligerent group. The government was compelled, therefore, to recognize not merely Swiss necessities but those of the surrounding belligerent territory; all sales of materials on the part of the belligerent Powers and their importation into Switzerland were consequently made subject to certain principles of reciprocity as well as to real or imaginary belligerent advantage, while, on the other hand, looking further afield the Swiss Government was compelled anxiously to watch its opportunity of securing transoceanic supplies through the French ports of Bordeaux and Cette, the latter port being on the Mediterranean and destined to rise through war conditions to a position of importance unknown to it for many centuries. Carriage via Rotterdam and the Rhine was soon seen to be impracticable, for international law, freely allowing commerce between neutral countries, has been obliged in the present war nevertheless, as on earlier occasions, to warrant the stoppage of supplies whose destination was only apparently neutral and in reality belligerent. Now Rotterdam was for all practical purposes a German seaport, and commerce in ascending the Rhine, after leaving Holland, necessarily passed through German territory before reaching Swiss borders. Switzerland, therefore, could only rely upon food supplies from beyond sea coming to her through Bordeaux, Cette, or the Italian port of Genoa. Again, it was not to the interest of the belligerent Powers surrounding Switzerland that raw material of any description should cross Swiss borders by way of importation from the territory of one belligerent to be subsequently either sold to another and opposing government, or converted through process of manufacture into merchandise useful in war to the opponent. Starting from such premises, Germany

insisted on severe conditions touching all material imported by the Swiss, none of which in any form, original or converted, should reach Entente territory. In addition to these more or less reasonable requirements there were added on Germany's part a series of demands for *compensation*, that is to say, if German coal, iron and steel, for example, were supplied to Swiss importers, Switzerland should guarantee to Germany permission to import needed agricultural and other supplies in certain proportional amounts annually.

With respect to the Allies, the regulations of the Swiss Surveillance Society expressly laid it down that permission to export might be given where there was no question of warlike use in the manufactured articles derived from the raw materials supplied by importations across the French border. Germany, however, went further and insisted that no German coal be used in any Swiss industry producing munitions of war exported to the Entente, and laid down these principles in a series of formal treaties. The seat of the Surveillance Society was in the federal capital of Berne; that of the German Trust Organization, S. T. S., at Zurich. The Swiss Government organized a special commission which might receive from the German authorities permission to import when the details had been satisfactorily passed upon by the Trust Office (S. T. S.) at Zurich. With the close of hostilities these complicated arrangements, never functioning without much friction, will now become things of the past. In theory and practice they were of course quite outside of the constitutional order, and were an emanation from the unrestricted executive authority given to the Federal Council on August 3, 1914.

Equally outside of constitutional provisions were the long series of measures devised by the Council as the war progressed, to secure the actual provisioning of the country and to relieve the serious questions arising between debtor and creditor. To assure an adequate supply of provisions, the government found itself compelled to sequester and in effect monopolize stocks on hand and to be imported of the principal foodstuffs; this process was ultimately extended to the milk, cheese and butter production, an equitable and necessary supply of these latter being found ultimately possible only

through direct aid extended by the government, which itself appropriates sufficient funds to meet the cost to the consumer in fixed proportions, so that all may be fed, and fed at a price which every class is found fairly able to pay.

The innumerable problems arising from the relation of debtor and creditor by reason of the stress produced by the war forced the government at the very outset to call to public assistance the institution of the moratorium and kindred measures. If we understand by the term moratorium a measure whose effect is to postpone maturities fixed by law or agreement, there were found, save in the case of registration of patents and industrial designs, few occasions for the enforcement of this institution, although allied measures of protection were numerous enough, and notably in the respite granted to mortgagors, including the railways, against a too severely abrupt realization of creditors' claims. In the category of those granted relief against a stress produced wholly by the war should be included the numerous company of hotel proprietors who found themselves in a peculiarly trying situation for the reason that many of the most noted Swiss resorts are leased only by those operating them, and these lessees, in the absence of pleasure travel, were quite unable to meet the demands of their landlords.

As the war progressed the extra-constitutional powers conferred upon the Federal Council began to seem oppressive to some and to others more or less in conflict with the traditions of Swiss self-government. It was found also that so constant were the demands of the country's necessities upon the Council that it perforce neglected to bring up before Parliament and the people for a final decision at the polls a series of constitutional reforms proposed by popular initiative, and received by the Council though not acted upon within the term of one year as contemplated by the constitution. Among these reforms is an initiative petition signed by over 100,000 voters and seeking to compel Parliament to submit national treaties for ratification by referendum vote; another measure would abolish public gaming. The treaty initiative took its rise in the conclusion of a convention by the Federal Council in 1909 with Germany and Italy renewing the earlier agreement under which the international St.

Gotthard Railway line was built. The treaty was ratified by Parliament, but it conceded, in the estimation of many voters, a series of far too important privileges and was in derogation of Swiss national interests. It is beyond doubt that with the ceasing of the war pressure upon the country's political and economic life, these and other constitutional measures will be brought up for popular determination. Indeed it is proposed, as these lines are being written, somewhat to curtail though not wholly abolish the Federal Council's unlimited powers, while a distinct movement is on foot to revise the national constitution in the interest of those *social*, as contrasted with merely political, aims which post-war days seem urgently to demand. We need not fear, however, that either a too great centralization of governmental control or a weakening of government itself in the interest of purely socialistic views will abrogate or greatly diminish traditions of fortitude, independence and free government which the Swiss have preserved through centuries of trial, and which they will hand down to their descendants as a bright example in the far future, as in the present, to all countries seeking to develop the highest ideals in personal and national life.<sup>1</sup>

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<sup>1</sup> Authorities: in *La Suisse Pendant La Guerre*, Professor Max Thurman, of Fribourg, has given an excellent outline of Red Cross and economic features; *La Suisse Neutre et Vigilante* collects all official documents of permanent utility and will prove invaluable as a work of reference; the Federal Council's reports to Parliament (*Rapports du Conseil Fédéral à l'Assemblée Fédérale sur les mesures prises par lui en vertu de l'arrêté fédéral du 3 août 1914*), of which eleven have been issued, are indispensable; some fifteen documents have been translated and published by the United States Naval War College in its *International Law Topics for 1916* and its *International Law Documents for 1917* under the care of Professor George Grafton Wilson of Harvard University.

## THE CONSTITUTIONALITY OF TREATIES

THE framers of the American Constitution did not anticipate or desire the conclusion of many treaties.<sup>1</sup> For this reason they made the process of treaty conclusion difficult, requiring that the President act only with the advice and consent of two-thirds of the Senators present,<sup>2</sup> some even wishing to require adhesion of the House of Representatives<sup>3</sup> or a two-thirds majority of the entire Senate.<sup>4</sup>

This hope, however, has scarcely been realized. With a total of 595 treaties from its foundation to August, 1914, the United States has averaged more than four a year, and for the twentieth century fifteen a year, or a treaty ratified every three weeks.<sup>5</sup> Along with the

<sup>1</sup> In the Federal Convention, Gouverneur Morris "Was not solicitous to multiply and facilitate treaties," and Madison "observed that it had been too easy in the present Congress to make treaties, although nine States were required for that purpose." Farrand, *Records of the Federal Convention*, 2: 393, 548. See also Jefferson, *Manual of Congressional Practice*, sec. 52, and letter to Madison, March 23, 1815, Moore, *International Law Digest*, 5: 162, 310.

<sup>2</sup> Under the Articles of Confederation, the treaty-making power was vested in a majority of nine States in Congress (Art. IX), and in some of the early drafts of the Constitution it was vested in Congress (Farrand, 2: 143), later in the Senate (*ibid.*, 2: 169, 183), and the President was finally added on the argument that treaty-making was properly an executive function (*ibid.*, 2: 297), and that a national agency was necessary as an offset to the especial State interest of the Senate. (*Ibid.*, 2: 392.)

<sup>3</sup> Pennsylvania especially desired this. G. Morris of that State wanted to add "but no treaty shall be binding on the United States which is not ratified by a law" (Farrand, 2: 297, 392. Later, Wilson of Pennsylvania proposed to add "and House of Representatives," saying that "as treaties are to have the operation of laws they ought to have the sanction of laws also." On vote, Pennsylvania alone supported the motion. (*Ibid.*, 2: 538). This is the vote referred to by Washington in his celebrated message on the Jay Treaty where he refused to recognize the claim of the House of Representatives to participate in treaty-making. (*Ibid.*, 3: 371; *Annals of Congress*, 4th Cong., 1st sess. p. 761).

<sup>4</sup> Farrand, 2: 549.

<sup>5</sup> By 25 year periods, treaties have been concluded as follows: 1778-1799, 21; 1800-1824, 20; 1825-1849, 63; 1850-1874, 141; 1875-1899, 142; 1900-1914, 208. This is in accord with the official enumeration of treaties (excluding Indian

steady increase in the number of treaties concluded a year, there has been a change in their usual character. Jefferson's warning against "entangling alliances" might be interpreted as a warning against treaties, for at that time the faithful observance of treaties commonly amounted to passive if not active alliance.<sup>6</sup> Aside from definite guarantees of offensive or defensive alliance, the pious hope of "perpetual peace and amity" between the contracting states, special privileges in war and neutrality, reciprocal favors in commerce and navigation, the termination of war, transfer of territory, fixation of boundaries, and recognition of status were the common subjects of treaty stipulation. The provisions were of a character indicating the competitive nature of international society. By mutually enjoying special privileges, the contracting states hoped to improve their political position with respect to other states of the world.<sup>7</sup> Thus the carrying out of treaty provisions was ordinarily a matter for the political organs of government.<sup>8</sup>

During the nineteenth century, however, treaties have tended to be regulative, rather than political in character.<sup>9</sup> Thus recent bilateral conventions commonly define extraditable crimes, provide for

treaties) begun by the Department of State on January 29, 1908, with Treaty Series, No. 489. (See Checklist of U. S. Public Documents, 1911, p. 978.) Including the protocols and *modus vivendi* printed in Malloy and Charles' Collections, the total for the period would be 633.

<sup>6</sup> "Perpetual peace and amity," if intended seriously, would amount to passive alliance, but frequently special favors by the "neutral," such as the use of ports for prizes, passage of troops, permission to recruit troops or even the guarantee of a fixed number of troops, rendered the passive alliance or condition of partiality more concrete. The association in Jefferson's mind is clear from the statement in his Manual of Parliamentary Practice, sec. 52. "The Constitution thought it wise to restrain the Executive and Senate from entangling and embroiling our affairs with those of Europe." (Moore, International Law Digest, 5: 162.

<sup>7</sup> Even where private interests, such as the rights of travel, residence, and property of aliens, rights of navigation, importation, etc., were considered, they were incorporated as subsidiary to a program of national commercial expansion, the ultimate aim of which was the augmentation of political strength. Mercantilist economics was at the basis of most treaty-making.

<sup>8</sup> Although the rules of maritime war and neutrality, frequently incorporated, could be applied by courts.

<sup>9</sup> The rise of Adam Smith's free trade economics tended at first to make



consular establishments, define conditions of naturalization and the rights of aliens, or provide for the arbitration or settlement of claims of specified character. Even treaties concerning commerce and navigation have to a considerable extent lost their character of special favors, through the almost universal employment of most-favored-nation clauses which render it difficult to grant a favor to one nation without thereby extending it to all, and are mainly regulative, defining the formalities of customs collection and sanitary inspection, the criteria for determining the nationality of vessels, the care of shipwrecks, etc., in addition to guarantees of most-favored-nation treatment and freedom of navigation.<sup>10</sup>

Even more remarkable is the development of general international agreements, either formulating principles of international law or establishing international unions for regulating agencies of communication, transportation and exchange; for exercising a rudimentary international police; for stimulating inventiveness, artistic produc-

equal treatment rather than special privilege the object of commercial treaties; though after the middle of the century intense trade rivalry again stimulated resort to exclusive arrangements. The geographic position of the United States, with its new idea of neutrality as complete impartiality rather than passive alliance, tended to give its treaties an especially non-political character. Finally, the extension of relations between individuals of different States due to improvements in means of transportation and intelligence has brought a wide range of non-political relations within the scope of treaty-making. See this JOURNAL, 10: 717. The change in character is perhaps indicated by the tendency to substitute for "treaty" the word "convention." Whereas a treaty (*tractatus*) is properly a contract (for definition, see Myers, this JOURNAL, 11: 538), a convention is rather an instrument regulating some specific subject. (Wilson and Tucker, *International Law*, 7th ed., p. 203.)

<sup>10</sup> The original purpose of most-favored-nation clauses was to protect merchants against discrimination, and Great Britain hoped to encourage a general adoption of the policy of free trade by their use. Other States, however, have attempted to employ them in commercial bargaining by the interpretation excluding reciprocal favors from their operation. This interpretation, in accord with the protective policy, has been traditional in the United States, and has been used by continental European countries, especially Germany since 1870 in her plan of general and conventional tariffs. See S. K. Hornbeck, this JOURNAL, 3: 397, who remarks, "Militarism, an emphatic national self-consciousness, and the application of the historical method to economic questions, appear among the chief causes which checked the tide of free trade and once more turned Europe toward protection." (*Ibid.*, 3: 420.)

tion, science and trade; for amicably settling controversies, etc. The attempt to codify international law by general agreement may be said to have begun with the classification of diplomatic agents by the Congress of Vienna in 1815, but it did not become important until after the Declaration of Paris of 1856, followed by the Geneva, St. Petersburg and Hague Conventions. The Congress of Vienna also began the era of international administration by establishing a régime for regulating the navigation of the Rhine; but while this and the International Sanitary Council of Tangier, Morocco, established in 1818, alone appear in a recent comprehensive list<sup>11</sup> of international administrative organizations, as established before 1850, the same list contains ten, from 1850 to 1875, twenty-one from 1875 to 1900, and twenty-one since 1900. In the half century between the American Civil War and the European War, more than seventy general international conventions were concluded. Agreements, either bilateral or general, for the amicable settlement of international controversies have been especially prominent in recent treaty making. Of 209 such agreements in force, 123 have been concluded since 1905.<sup>12</sup>

Thus, while the number of treaties has increased, their predominant character has changed from that of political contracts to codes of law or administrative regulations providing for international cooperation in a smaller or wider circle. The bulk of recent treaty provisions are not capable of being carried out by political agencies exclusively, but require the continuous action of many administrative authorities within states, as well as the cooperation of courts in applying their provisions to cases between private individuals. A treaty of this character really establishes a legal order embracing all persons and governmental agencies within the contracting states.<sup>13</sup> It thus becomes important to determine the extent of legal responsibility which private persons and public officers owe to this treaty-established legal order, especially when the obligations it imposes appear to conflict with obligations imposed by the Constitution or laws of the state.

<sup>11</sup> D. P. Myers, World Peace Foundation, Pamphlet Series, Vol. VI, No. 6, p. 24.

<sup>12</sup> *Ibid.*, p. 8.

<sup>13</sup> See this JOURNAL, 10: 717, and authorities there cited.

The treaties relating to the pacific settlement of international controversies, in addition to detailed regulations for conducting arbitrations and conciliations, have sometimes imposed a positive obligation upon the contractuaries to refrain from war or reprisal until these amicable means of settlement have been tried. Article 21 of the Treaty of Guadalupe-Hidalgo, between the United States and Mexico (1848), forbade resort to "reprisals, aggression or hostility of any kind" until the government of the state "which deems itself aggrieved shall have maturely considered, in the spirit of peace and good neighborhood, whether it would not be better that such difference should be settled by the arbitration of commissioners appointed by each side, or by that of a friendly nation." The same idea has come into prominence through the twenty Wilson-Bryan peace treaties concluded by the United States since 1914. In these the contractuaries agree to submit all non-arbitral disputes to a high commission which shall submit a report within a year, and "they agree not to declare war or begin hostilities during such investigation and before the report is submitted."

The same idea is given more definite sanction in the Covenant of the League of Nations accepted by the Paris Peace Conference on April 28, 1919, which recognizes the legal responsibility of all parties to employ effective measures in defense of its terms.<sup>14</sup>

<sup>14</sup> Such a responsibility was recognized in the Amphyctionic oath to punish violators of the Covenant "with foot and hand and voice and by every means in our power." (Darby, *International Tribunals*, 4th ed., 1904, p. 6.) Solon's assertion that "That Commonwealth is best administered in which any wrongs that are done to individuals are resented and redressed by the other members of the community, as promptly and as vigorously, as if they themselves were personal sufferers" (Plutarch, Solon, sec. 18) has been thought applicable to the commonwealth of states by later writers. (Grotius, I, c. 5, sec. 2; Creasy, p. 44.) The thought is embodied in a celebrated passage by Suarez (*Tractatus de Legibus ac Deo Legislatore* (1612), II, c. 19, sec. 9) and is essential in the systems of Grotius (*De Jure Belli ac Pacis* (1625), *Prolegomena*, sec. 18, 19, I, c. 5, sec. 1, 2; II, c. 20, sec. 40, par. 4; c. 25, sec. 6) and Wolff (*Jus Naturæ et Jus Gentium*, 1740, sec. 1090). Though Vattel departed from his master and rejected the conception of the *Civitas Maxima* (preface, Carnegie ed., p. 9a), he admitted a limited responsibility on the part of each state to maintain the general law. "If there be any that makes an open profession of trampling justice under foot or despising and violating the right of others, whenever it finds the opportunity, the interest of human society will authorize all others to unite in order

In the presence of treaties which impose a legal obligation upon states to refrain from, or to engage in, types of action (such as war and intervention) which have traditionally been regarded as of an exclusively political character, the question arises, can the authorities of states carry them out without radical modification of existing constitutions and legal theory? Can a state in good faith undertake, as a legal obligation, matters left by its Constitution to the unlimited discretion of the political authorities? If it can, justification for such broad exercise of the treaty-making power must be found in the constitutional principles of the state itself.

The rise in importance of treaties establishing a legal order wider than the state, and of treaties creating a general responsibility for the security of the world order, makes the relation of treaties to the constitutional law of states a question of practical importance.

#### THE UNITED STATES

In the United States the question of constitutional limitations of the treaty power has been much discussed, and three views may be

to humble and chastise it." (*Le Droit des gens*, II, c. 5, sec. 70, see also Prelim. sec. 22.) Katenborn says, "From the point of view of the science of international law, the body of states subject to international law must be regarded *in abstracto* as obligated to protect the rights of each individual state and, accordingly, is obligated to offer legal procedure and grant legal awards in the case of disputes and injuries." (*Zeits. für die gesamte Staatswissenschaft*, 27: 86, (1861), quoted by Schücking, *The International Union of the Hague Conferences*, 1919, p. 46); and Daniel Webster thought it a sufficient answer to the claim that America was not interested in the injustices of Europe "to say that we are one of the nations of the earth; that we have an interest, therefore, in the preservation of that system of national law and rational intercourse which has heretofore subsisted so beneficially for us all. . . . We have as clear an interest in international law as individuals have in the laws of society." (*Writings*, ed. 1903, 5: 75.) More recently the theory was clearly stated by Elihu Root, "If the law of nations is to be binding, if the decisions of tribunals charged with the application of that law to international controversies are to be respected, there must be a change in theory, and violations of the law of such a character as to threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilized nation to have the law maintained and a legal injury to every nation." (*This JOURNAL*, 10:9.) See also Creazy, "First Platform of International Law," London, 1876, p. 44; Amos, *Jurisprudence*, London, 1872, pp. 411, 456; *this JOURNAL*, 12:78-79.

distinguished: (1) The treaty-making power is entirely unlimited; (2) the treaty-making power is subject to constitutional limitations, but the observance of these limitations is entrusted to the treaty power itself, the Senate being especially charged with this function; (3) the treaty-making power is subject to constitutional limitations, and a treaty in conflict with the Constitution is void and may be so declared by the courts in the same manner as a statute. The bulk of authority can be marshalled in favor of the third view, but actual practice seems to lend support to the second. Mr. Marcy, while Secretary of State, said:<sup>15</sup> "The Constitution is to prevail over a treaty where the provisions of the one come in conflict with the other. It would be difficult to find a reputable lawyer in this country who would not yield a ready assent to this proposition." Yet it does not appear that a court has ever declared a provision of a treaty void as being in conflict with the Constitution,<sup>16</sup> and in some cases constitutional provisions apparently in conflict with treaty provisions have been interpreted so as to permit the application of the treaty.

The Senate, on the other hand, has regarded itself as the especial guardian of the Constitution in exercising its part in treaty making and has frequently refused to consent to the ratification of treaties thought to be unconstitutional.<sup>17</sup>

<sup>15</sup> Mr. Marcy to Mr. Mason, September 11, 1854, Moore 5: 167. To the same effect, see Mr. Marcy to Mr. Aspuria, November 15, 1854; Mr. Blaine to Mr. Chen Lan Pin, March 25, 1881; Mr. Cass to Lord Napier, February 7, 1859, Moore, 5: 169, 177; Cherokee Tobacco Case, 11 Wall. 616 (1870); *Geofroy v. Riggs*, 133 U. S. 258 (1890); Corwin, *National Supremacy*, N. Y., 1913, p. 5; Crandall, "Treaties, their Making and Enforcement," Washington, 1916, p. 266; Von Holst, "Constitutional Law of the United States," Chicago, 1887, p. 202.

<sup>16</sup> Corwin, *op. cit.*, p. 5; Anderson, this JOURNAL, 1: 647; Willoughby, *Constitutional Law*, 1910, 1: 493.

<sup>17</sup> Ralston Hayden, "The States' Rights Doctrine and the Treaty-making Power," *Am. Hist. Rev.*, 22: 56; Corwin, *op. cit.*, 141, 302. The fathers seem to have considered the Senate a special bulwark of States' rights, Farrand, *op. cit.*, 2: 393; *The Federalist*, No. 64 (Jay), Ford. ed., p. 432; Elliot, *Debates*, 4: 137. The situation has made altercation between the Executive and the Senate as to their relative share in treaty-making perennial. One of the first instances is described by John Quincy Adams: "Mr. Crawford told twice over the story of President Washington's having at an early period of his administration gone to the Senate with a project of a treaty to be negotiated, and been present at their deliberations upon it. They debated it and proposed alterations, so that

The argument for an unlimited treaty-making power is grounded on a possible necessity and has been thus stated:

Laws operate only on land over which our government is an exclusive sovereign, and it can thus always so formulate them as to conform to the Constitution. But treaties operate upon other nations, and therefore must conform to the wills of all the signatory Powers. For example: our Constitution guarantees every State a republican form of government. But if a monarchical Power were to occupy, say, the State of Maine, and vanquish us in the war, the treaty of peace might have to convert such state to a monarchical form of government through conquest, and no court could nullify such treaty on the ground that it violated the Constitution. This was all within the ken of those who made the Constitution. Therefore, while only laws made in "pursuance" of the Constitution are valid, yet all "treaties made, or which shall be made under the authority of the United States" are valid when properly ratified. Otherwise our first unsuccessful war, involving terms of peace disappointing to some alleged constitutional inhibitions, might find us institutionally impotent to make terms of peace with a superior force. In which event the government would perish, and the whole Constitution with it. In the nature of things, and *ex necessitate* in case of war, the treaty-making right, or power, can not be subject to any such limitations.

when Washington left the Senate Chamber he said he would be d——d if he ever went there again. And ever since that time treaties have been negotiated by the Executive *before* submitting them to the consideration of the Senate. (Memoirs, 6: 427.) Senator Maclay comments on the same incident: "I can not now be mistaken. The President wishes to tread on the necks of the Senate. Commitment will bring the matter to discussion, at least in the committee, where he is not present. He wishes us to see with the eyes and hear with the ears of his Secretary alone. The Secretary to advance the premises, the President to draw the conclusions, and to bear down our deliberations with his personal authority and presence. Form only will be left to us. This will soon cure itself." ("Journal of William Maclay," N. Y., 1890, p. 132.) John Hay's attitude while Secretary of State is well known. On April 24, 1900, he wrote: "Matters have come to such a pass with the Senate that it seems absolutely impossible to do business. . . . The fact that a treaty gives to this country a great, lasting advantage, seems to weigh nothing whatever in the minds of about half the Senators. Personal interests, personal spites, and a contingent chance of petty political advantage are the only motives that cut any ice at present." In 1904 his attitude was more philosophical: "A treaty entering the Senate is like a bull going into the arena: no one can say just how or when the final blow will fall—but one thing is certain—it will never leave the arena alive." (Thayer, "The Life of John Hay," 2:274, 393. See also, *ibid.*, 2: 254, 273.) See also, Corwin, "The President's Control of Foreign Relations," 1917, p. 87.

It is the right of self-preservation and must be free-footed and free-armed.<sup>18</sup>

The proper view appears to be a synthesis of all three. The treaty-making power is subject to constitutional limitations enforceable by the courts. But most of the important distributions of function implicit in the spirit of the Constitution do not apply to the treaty power by the strict letter of that instrument. The preservation of these and the determination of the legitimate scope of treaty-making is a political question<sup>19</sup> confided to the good faith, good sense, constitutional obligation, and sense of political responsibility of the President and Senate in performing their appointed functions. There are probably no limitations which could not be transcended in case of necessity, though this is a matter outside of the law. A treaty, although manifestly violating the Constitution if necessary to secure peace, would, like revolution or intervention, be justified by its "success" in preventing a worse situation.<sup>20</sup> It would have to be accepted as a *fait accompli* by the courts and other organs of the government, but it would nevertheless be illegal in its origin.

The constitutionality of treaties depends upon canons the reverse of those determining the constitutionality of statutes. While an Act of Congress can only be regarded as valid when it is in pursuance of an express *grant* of power or a power readily implied therefrom, a treaty would be regarded by the courts as valid, unless

<sup>18</sup> Congressman D. J. Lewis, February 17, 1917, Cong. Rec., 64th Cong., 2nd Sess., p. 4205.

<sup>19</sup> A considerable number of constitutional questions are regarded by the courts as "political questions" and left to the discretion of political organs. Such are the questions: What constitutes a "republican form of government?" (Const. Art. IV, sec. 4; *Luther v. Borden*, 7 How. 1, 1848); what constitutes "invasion" or "rebellion" permitting the calling out of the militia? (Const. Art. I, sec. 8, cl. 15; *Martin v. Mott*, 12 Wheat., 19, 1827); what territory belongs to the United States? (Const. Art. IV, sec. 3, cl. 2; *Jones v. U. S.*, 137 U. S. 202, 1890), etc.

<sup>20</sup> "It is a high and summary procedure which may sometimes snatch a remedy beyond the reach of law. Nevertheless, it must be admitted that in case of Intervention, as in that of Revolution, its essence is illegality, and its justification is its success." *Historicus* (Sir Vernon Harcourt), "Letters on Some Questions of International Law," London, 1883, p. 41.

it violated an express *prohibition* imposed upon the Government of the United States or a prohibition readily implied from the nature of the government. This difference is explained by the fact that the legislative power is divided between the national government and the state governments, whereas the treaty-making power is given *in toto* to the national government<sup>21</sup> and specifically prohibited to the States.<sup>22</sup> The distinction is recognized in Article VI, according to which statutes, to be the "supreme law of the land," must be "in pursuance" of the Constitution, while treaties need only have been made "under the authority of the United States."<sup>23</sup>

To decide what prohibitions of the Constitution are actually applicable to the treaty-making power, a concrete examination of the various provisions is necessary. Constitutional limitations may be divided into three classes: (1) those based on the division of power between national and state governments; (2) those based upon general prohibitions of the power of government in defense of individual rights (3) those based upon the separation of the departments of the national government.<sup>24</sup>

<sup>21</sup> Constitution, Art. II, sec. 2, cl. 2.

<sup>22</sup> "No State shall enter into any treaty, alliance or confederation" (Const. Art. I, sec. 10, cl. 1). Against the exclusiveness of the national treaty power, Art. I, sec. 10, cl. 3 ("No State shall, *without the consent of Congress*. . . . enter into any agreement or compact with another State, or with a foreign power") has been urged. (W. E. Mikell, *Am. Law. Reg.*, 57: 435, 528.) In view of the earlier absolute prohibition, it seems that these "agreements and compacts" must be distinguished from treaties, probably referring "to trifling and temporary arrangements between States and foreign powers without substantial political or economic effect." (J. P. Hall, "State Interference with the enforcement of Treaties," *Proc. Acad. of Pol. Sci.*, 7: 555.) See also, *Holmes v. Jennison*, 14 Pet. 571; *Va. v. Tenn.*, 148 U. S. 503; *Legare*, Att. Gen. 3 Op. 661 (1841); C. P. Anderson, this *JOURNAL*, 1: 638; A. A. Bruce, *Minn. Law Rev.*, 2: 500 (June, 1918); *Crandall, op. cit.*, p. 141; J. P. Hall, *Constitutional Law*, 1911, p. 328.

<sup>23</sup> The immediate motive for the difference in form appears to have been to insure the validity of treaties concluded before 1789. (Farrand, *op. cit.*, 2:417; Corwin, *op. cit.*, p. 64.) The State ratifying conventions understood the phraseology to extend the subjects of treaty making beyond the subjects of Congressional legislation. (Corwin, *op. cit.*, p. 66.)

<sup>24</sup> See *Treaties and the Constitutional Separation of Powers in the United States*, this *JOURNAL*, 12:64.



## (1) NATIONAL GOVERNMENT AND STATES

The Constitution provides that <sup>25</sup> "powers not delegated to the United States by this Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." From this it has been argued that the treaty-making power only embraces matters specifically delegated by the Constitution to the national government, all other matters being within the field of (a) "states' rights," (b) "reserved powers," or (c) "residual powers."<sup>26</sup>

<sup>25</sup> Amendment X.

<sup>26</sup> Three distinct theories of State powers as opposed to the treaty power can be distinguished: (1) The States as "quasi-sovereign" entities enjoy certain "natural" States rights which can not be alienated without entire sacrifice of State autonomy and the federal theory of the Constitution. (2) By implication of the Constitution, certain powers have been *reserved* by the States and excluded from all interference by national organs. "It (the Constitution) must have meant to except out of this, the rights reserved to the States: for surely the President and Senate can not do by treaty what the whole government is interdicted from doing, in any way." (Jefferson, "Manual of Parliamentary Practice," sec. 52.) The ambiguous second clause must be interpreted with reference to the first clause, as referring to the President, Senate and House of Representatives acting as the legislative power. Most of the "interdictions" really applying to "the whole government" are in defense of individual rights, and clearly are not powers "reserved" to the States, though it is true that the guaranties of individual rights in the first eight amendments were in a sense reservations made by the States in behalf of their citizens, as against the national government. (See Boutmy, "Studies in Constitutional Law," London, 1891, p. 63.) (3) All *residual* powers, or powers not specifically delegated to the national government, are exempt from interference by the treaty power. This theory excludes the treaty power itself from the delegations of power. Considered thus, it becomes merely a method of exercising these powers. "The treaty-making power, under this Constitution, can never be any other than subsidiary—is never a power independent in its vocation, however it is so in its name and structure. It is the handmaid—waits on the occasion of the other powers; and though in no posture to receive orders from them, it never yet moves to its exertion, save in subordination to their desires." (Report of Senate Committee, 1845, 56th Cong. 2nd Sess., Sen. Doc. No. 231, 6:82.) For these distinctions see Corwin, *op. cit.*, p. 121. While the scope or *extensivity* of exclusive State powers becomes greater in the third and in the second or first theories, their inalienability, or *intensity*, become less. The residual theory appears to most limit the treaty power, yet by a liberal interpretation of delegated powers, it can be indefinitely extended, while the States' rights theory, although

(A) A "states' right" most frequently admitted to limit the treaty power is that to the integrity of territory.<sup>27</sup> In Washington's Cabinet, Jefferson maintained that "the United States had no right to alienate an inch of the territory of any State," while Hamilton took the opposite view.<sup>28</sup> While admission of the supremacy of treaties granting Indian tribes an exclusive right in reservations within the States<sup>29</sup> seems to go far toward admitting the right of the treaty power to alienate State territory, still an actual cession was not here in question, and later practice<sup>30</sup> and opinion<sup>31</sup> have con-

apparently imposing few limitations, yet defends these with such tenacity that they may prove insurmountable obstacles. When the first and third theories are united, and all residual powers become inalienable States' rights, the situation becomes ominous for the federal government. Where the two theories are compromised, as in the reserved power theory, there is less danger for the existence of the federal government.

<sup>27</sup> This right gains additional support from Art. IV, sec. 3, cl. 1, forbidding the formation of a new State "within the jurisdiction of any other State" without the consent of the State legislature. The preservation of a republican form of government, guaranteed by Article IV, sec. 4, might seem a "States' right" of similar character, but the discretionary power assumed by organs of the national government to determine what is a republican form of government seems to cast some doubt on this conclusion. (*Texas v. White*, 7 Wall. 700.) The implied exemption of State officers from taxation, is also a States' right (*Collector v. Day*, 11 Wall. 113), though it could hardly be encroached upon by the treaty power. The guarantees of individual rights in Art. I, sec. 9, and the first eight amendments, were in their original intention reserved by the States for individuals as *citizens of the States*, and so might be called "States' rights." With the passage of the XIII, XIV, and XV Amendments, however, individual guarantees have assumed the character of rights guaranteed to individuals against the national or State governments and so can hardly be considered States' rights. (Boutmy, *op. cit.*, p. 63.) For discussion of the effect of these guaranties on the treaty power, see *infra*, sec. 2.

<sup>28</sup> Extract from Jefferson's *Anas*, March 11, 1792, Wharton, 2: 66.

<sup>29</sup> *Worcester v. Ga.*, 6 Pet. 515 (1832). President Jackson doubted the correctness of this decision and refused to enforce it.

<sup>30</sup> By Art. V of the Webster-Ashburton Treaty of 1842, the United States agreed to pay the States of Massachusetts and Maine "three hundred thousand dollars, in equal moities, on account of their assent to the line of boundary described in the treaty."

<sup>31</sup> *Dicta* in *Lattimer v. Poteet*, 14 Pet. 14 (1840); *Geofroy v. Riggs*, 133 U. S. 267 (1890); *Insular cases*, 182 U. S. 316 (1901); *Fort Leavenworth Railroad Co. v. Lowe*, 114 U. S. 525, 541. See Moore, 5: 171-175; Butler, "The Treaty-Making Power," 1902, 1: 411-413, 2: 238, 287-294; Corwin, *op. cit.*, pp. 130-134.

curred in denying the right of cession without State consent, unless necessary to terminate a war.

(B) Additional "reserved powers" are sometimes grouped together as the police power, but can be distinguished as the power (1) to regulate exclusively land and natural resources; (2) to exercise exclusive control over public services supported by State taxation; and (3) to exercise police power over classes of persons and businesses in behalf of public safety, health, morals and economic welfare. Treaty provisions, guaranteeing to aliens rights of entry, residence, landholding, inheritance, etc., equal to that of citizens or subjects of the most-favored nation,<sup>32</sup> have been alleged to conflict with the exercise by the States of these "reserved" powers through laws discriminating against aliens, or aliens of a particular race or nationality (1) in the privilege of owning land,<sup>33</sup> operating mines,<sup>34</sup> and taking fish<sup>35</sup> and game;<sup>36</sup> (2) in the use of public schools<sup>37</sup> and the right to labor on public works;<sup>38</sup> (3) and in the

<sup>32</sup> Art. XI of the treaty of 1778 with France and Art. I of the treaty of 1894 with Japan, superseded by Art. 1 of the treaty of 1911, are examples of this type of provision.

<sup>33</sup> *Fairfax v. Hunter*, 7 Cr. 503; *Chirac v. Chirac*, 2 Wheat. 259 (1817); *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 646 (1823); *Carneal v. Banks*, 10 Wheat. 259 (1825); California-Japanese controversy, 1913, *Corwin, op. cit.*, p. 232; editorial, this JOURNAL, 8: 571. Art. VII of the treaty of 1853 with France made concessions to the "States' right." It allowed Frenchmen to possess land on an equality with citizens "in all the States of the Union where existing laws permit it, so long and to the same extent as the said laws shall remain in force." As to other States, "the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring the right."

<sup>34</sup> *People v. Naglee*, 1 Cal. 232 (1850).

<sup>35</sup> *Griggs, Att. Gen.*, 1898, 22 Op. 214.

<sup>36</sup> *Patson v. Pa.*, 232 U. S. 138, 145.

<sup>37</sup> California-Japanese school children controversy, 1906, *Corwin op. cit.*, p. 217; *E. Root*, this JOURNAL, 1: 273, editorial, this JOURNAL, 1: 150, 449; Art. IV of the treaty of 1854 with Great Britain indicates that the United States doubted its right to control a State-established utility, without State consent. "The Government of the United States further engages to urge upon the State government to secure to the subjects of Her Britannic Majesty the use of the several State Canals on terms of equality with the inhabitants of the United States."

<sup>38</sup> *Baker v. Portland*, 5 Sawyer 566 (1879); *Heim v. McCall*, 239 U. S. 175, 193 (1915), this JOURNAL, 10: 162.

freedom of immigration,<sup>39</sup> labor,<sup>40</sup> personal habits,<sup>41</sup> and conduct of business.<sup>42</sup> In a few cases *dicta* damaging to the treaty power have been uttered;<sup>43</sup> sometimes the treaty has been subjected to a strained interpretation to save the State's power;<sup>44</sup> but in no case has a clear treaty provision been superseded by the State law. On the contrary, State statutes of this character have frequently been declared void when conflicting with clear treaty provisions.<sup>45</sup> With respect to statutes relating to the control of natural resources and State-supported services, the attitude of the courts has been cautious, with a decided tendency in recent cases to compromise by adopting interpretations of the treaty favorable to the State power.<sup>46</sup> The question, however, has been on the applicability of the treaty, not upon its validity.

(C) The extreme extension of State power has been put forward in the claim that unlimited discretion in the regulation and taxation of property and inheritances is a "residual" power exempt from interference by the treaty-making power. Treaties of the character mentioned have sometimes conflicted with the alleged exclusive

<sup>39</sup> *Elkison v. Delieesseline*, Leg. Doc. Mass. 1845 (Senate), No. 31, p. 39 (1823); Thayer, *Cases in Constitutional Law*, p. 1849; Corwin, *op. cit.*, p. 125; Wirt, Att. Gen. 10, p. 661 (1824); Berrien, Att. Gen., 20, p. 431 (1831); *The Passenger Cases*, 7 How. 283 (1849); *In re Ah Fong*, 3 Sawyer 144; *Henderson v. N. Y.* 92 U. S. 259 (1875).

<sup>40</sup> *In re Tiburcio Parrott*, 6 Sawyer 349 (1880); *Truax v. Raich*, 239 U. S. 33, 43 (1915), this JOURNAL, 10: 158.

<sup>41</sup> *Ho Ah Kow v. Nunan*, 5 Sawyer 532 (1879).

<sup>42</sup> *Yick Wo v. Hopkins*, 118 U. S. 356 (1886); *Compagnie Francaise v. State Board of Health*, 186 U. S. 380 (1902). Frequently in these cases the XIVth Amendment, as well as treaties, have been in opposition to the exercise of State powers. See also *Rocca v. Thompson*, 223 U. S. 317 (1912).

<sup>43</sup> Taney, C. J., in *Holmes v. Jennison*, 14 Pet. 540 (1840); *The Passenger Cases*, 7 How. 283, 465 (1849); Daniels, J., in *The License Cases*, 5 How. 504, 613; Grier, J., in *The Passenger Cases*, 7 How. 283 (1849).

<sup>44</sup> *Compagnie Francaise v. State Board of Health*, 186 U. S. 380 (1902). *Rocca v. Thompson*, 223 U. S. 317 (1912).

<sup>45</sup> *Chirac v. Chirac*, 2 Wheat. 259 (1817); *Elkison v. Delieesseline*, *supra*, note 39; *In re Tiburcio Parrott*, 6 Sawyer, 349 (1880); *Truax v. Raich*, 239 U. S. 33, 43 (1915), this JOURNAL, 10: 158.

<sup>46</sup> *Patsone v. Pa.*, 232 U. S. 138, 145; *Heim v. McCall*, 239 U. S. 175, 193 (1915), this JOURNAL, 10: 162.

right of the State to regulate the ownership, transmission and inheritance of property within its limits.<sup>47</sup> An historical view of the many cases bearing upon this point shows that in the days of Marshall<sup>48</sup> and since the Civil War<sup>49</sup> the Supreme Court has uniformly and in no uncertain voice sustained the treaty power as against alleged States "residual" powers. Only during the period preceding the Civil War was there a wavering, even then confined to *dicta*.<sup>50</sup>

Statesmen and text writers with few exceptions have taken a similar attitude in support of a broad treaty power.<sup>51</sup>

<sup>47</sup> *Ware v. Hylton*, 3 Dall. 199 (1796); *Prevost v. Greenaux*, 10 How. 1 (1856); *Fredrickson v. La.*, 23 How. 443 (1860); *Hauenstein v. Lynham*, 100 U. S. 483 (1870); *Wynans, Petitioner*, 191 Mass. 276; *People v. Gerke*, 5 Cal. 381 (1885).

<sup>48</sup> *Fairfax v. Hunter*, 7 Cr. 603 (1813); *Chirac v. Chirac*, 2 Wheat. 259 (1817).

<sup>49</sup> *Hauenstein v. Lynham*, 100 U. S. 483 (1879); *Geofroy v. Riggs*, 133 U. S. 258 (1890).

<sup>50</sup> *Supra*, note 43.

<sup>51</sup> For supremacy of treaty power over State powers:

Anderson, C. P., this JOURNAL, 1: 636.

Burr, *The Treaty Making Power of the United States*, 1912; Proc. Am. Phil. Soc., Vol. 51.

Butler, *The Treaty Making Power of the United States*, 1902.

Calhoun, *Discourse*, Works, ed., 1853, 1: 202; *Elliot's Debates*, 4: 463.

Corwin, *National Supremacy*, 1913.

Crandall, *Treaties, their Making and Enforcement*, 1916; 1st ed. Columbia University Studies, 1904.

Devlin, *The Treaty Power under the Constitution of the United States*, San Francisco, 1908.

Elliot, E. C., "The Treaty Making Power, with Reference to the Reserved Powers of the States," *Case and Comment*, 22: 77 (1913).

Hall, J. P., *State Interference with the Enforcement of Treaties*, Proc. Acad. Pol. Sci., 7: 24.

Livingston, Sec. of State, Wharton, 2: 67.

Moore, J. B., *Pol. Sci. Quar.* 32: 320.

Pomeroy, *An Introduction to the Constitutional Law of the United States*, 10th ed., 1888, sec. 674.

Root, this JOURNAL, 1: 273.

Story, *Commentaries on the Constitution*, sec. 1841.

Willoughby, W. W., *The Constitutional Law of the United States*, vol. 2, 1910, sec. 210, 215.

As a principle of constitutional interpretation, the argument from the Tenth Amendment for a limitation of the treaty power by the "residual," or by the "reserved," rights of the States can not be admitted. This provision does not limit the treaty-making power, because the Constitution has "*delegated*" the treaty power in its entirety to the "United States" in the words<sup>52</sup> "(The President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." Hence no specific delegation of the subject-matter is needed. If the subject is one appropriate for international negotiation, it is within the "authority of the United States" to conclude a treaty thereon. In this connection, it should be emphasized that treaty making is specifically prohibited by the Constitution to the States.<sup>53</sup> Hence, if a field appropriate for treaty making is denied the national treaty-making power, an important governmental power is lacking in the American state.<sup>54</sup>

An analogy between the national treaty power and the national legislative power can not be assumed, because with the latter State legislative power covers the residuum not given the national government, but there is no State treaty power.<sup>55</sup> The national treaty power, both in practice<sup>56</sup> and theory,<sup>57</sup> covers a wider range of subjects than the power of Congress.

Against supremacy of treaty power over State powers:

Hayden, *Am. Hist. Rev.*, 22: 566, takes a historical view showing that the political check has sometimes preserved States' rights from adverse treaties.

Jefferson, *Manual of Parliamentary Practice*, sec. 52.

Mikell, *University of Pa. Law. Rev.*, 57: 435, 528.

Tucker, *H. St. G., Limitations on the Treaty Making Power under the Constitution of the United States*, Boston, 1915.

<sup>52</sup> Art. II, sec. 2, cl. 2.

<sup>53</sup> Art. I, sec. 10, cl. 1. In reference to Art. I, sec. 10, cl. 3, see *supra*, note 22.

<sup>54</sup> Cushing, *Att. Gen.*, 8 Op. 411; Anderson, this JOURNAL, 1: 665; Corwin, *op. cit.*, p. 163.

<sup>55</sup> As there is in Germany and Switzerland.

<sup>56</sup> Treaty guarantees of property rights of aliens within the States have been common since the first treaty of the United States in 1778 (Art. ix), though the matter is beyond the competence of Congress. Trade mark protection is within the treaty power (Moore, 2: 36-42), though not within the independent power of Congress. (The Trade Mark Cases, 100 U. S. 82, 1879.)

<sup>57</sup> Secretary Root emphasized this when he suggested that there is a differ-

The immunity from treaty interference of certain State powers can only be sustained by showing that they cover a subject-matter inherently inappropriate for treaty negotiation. That there are matters within State legislative competence thus excluded from treaty making is doubtless true. If a treaty were used as a subterfuge for tampering with the political or territorial autonomy of a State, or for wresting from it that control over its natural resources, public services, and the social and economic environment of its people, necessary to insure internal order and progress, undoubtedly the courts could declare it void as not really a treaty at all.<sup>58</sup>

As a matter of political expediency, an even wider respect for State autonomy may be appropriate, and it was thus to safeguard the interests of the States that the Senate was made such an important element in treaty making.<sup>59</sup> This function the Senate has recognized, and, especially in the period before the Civil War, frequently exercised a veto upon treaties thought to violate States' rights, or redrafted them so as to permit of State consent before the treaty became effective within its territory.<sup>60</sup>

It thus appears that States' reserved and residual powers oppose no legal bar to negotiation and contraction of obligations on any subject appropriate for treaty making, though the treaty-making power itself may regard it as advisable to consider the susceptibilities

ence between the treaty-power and the legislative powers of the national government, with reference to State power, on account of the fact that the States have no treaty power. (This JOURNAL, 1:278.) Mr. Corwin has strangely misunderstood this remark, saying, "This, of course, is error. There are no reserved powers of the States against *any* power of the United States." Secretary Root referred to the subject-matter covered respectively by the two powers. Mr. Corwin interprets him as referring to the nature of the limitation. Neither are limited by any "reserved States rights," it is true, but there is a wide subject-matter, as, for instance, the property and personal rights of aliens within the States, which the treaty power can handle and Congress can not unless it be to render existing treaties effective. See Corwin, *op. cit.*, p. 226; Anderson, this JOURNAL, 1: 667.

<sup>58</sup> *Geofroy v. Riggs*, 133 U. S. 258; Story, *op. cit.*, sec. 1508; Cooley, *Constitutional Limitations*, p. 103; Thayer, *Cases 1: 373*; Willoughby, *op. cit.*, p. 247; Root, this JOURNAL, 1: 273; Corwin, *op. cit.*, p. 19.

<sup>59</sup> *Supra*, note 17.

<sup>60</sup> Hayden, *op. cit.*, *Am. Hist. Rev.*, 22: 56. See example, *supra*, note 33.

and interests of States before ratifying treaties. The courts could hardly refuse to apply a treaty on the grounds of a conflict with State powers so long as its subject-matter was *bona fide* appropriate for international contract.

## (2) CONSTITUTIONAL GUARANTEES

There are a considerable number of express prohibitions upon the power of the national government, and these undoubtedly limit the treaty-making power, as they do all other departments of the national government. Some of the prohibitions apply only to Congress,<sup>61</sup> some only to the judiciary,<sup>62</sup> and some only to the States,<sup>63</sup> but those expressed in general terms<sup>64</sup> apply to all organs and agencies of the national government.<sup>65</sup> Consequently, a treaty in conflict with such a provision would not be made "under the authority of the United States" and would not be law in the sense of Article VI, section 2.

The Constitution guarantees to a person accused of crime "compulsory process for obtaining witnesses in his favor."<sup>66</sup> Article II of the treaty with France of 1853 provided that consuls of the contractuaries should "never be compelled to appear as witnesses before the courts." A conflict was thus presented to the United States district court of California when *subpœna* was issued against a French consul. The court upheld the treaty by interpreting the Constitution as guaranteeing to the accused only the same rights of compelling testimony as to the prosecution.<sup>67</sup> France had made a diplomatic protest, claiming that the original arrest of the consul was in violation of the treaty, whereupon Secretary of State Marcy

<sup>61</sup> Art. I, sec. 9, cl. 1; Amendment I.

<sup>62</sup> Amendment XI.

<sup>63</sup> Art. I, sec. 10, Amendment XIV, sec. 1.

<sup>64</sup> Art. I, sec. 9, cl. 2-8; Amendments II-VIII, XIII, XV, XVIII. Probably Amendment I should be regarded as in the same class, though in terms applying only to Congress.

<sup>65</sup> That they do not apply to the States, see *Barron v. Baltimore*, 7 Pet. 243 (1833).

<sup>66</sup> Amendment VI.

<sup>67</sup> *In re Dillon*, Fed. Cas. 3914 (1854).



upheld the authority of the Constitution, taking a reverse attitude from that of the court. He said: <sup>68</sup>

This principle, the President directs me to say, he cannot disavow, nor would it be candid in him to withhold an expression of his belief that if a case should arise presenting a direct conflict between the Constitution of the United States and a treaty made by authority thereof, and be brought before our highest tribunal for adjudication, the court would act upon the principle that the Constitution was paramount law.

It appears that Secretary Marcy's view has been adhered to since this occurrence, because such immunities have not been granted in later consular conventions.<sup>69</sup>

Undoubtedly the more fundamental guarantees, such as that of "due process of law," can not be abridged by the treaty-making power. Thus, in the cases involving the Spanish cessions of 1898, the court held that, while treaty acquisitions of territory did not automatically extend all of the constitutional guarantees to the acquired territory, neither the treaty power nor Congress could deprive the inhabitants of those guarantees which might be called "natural rights."<sup>70</sup>

A treaty may, however, provide for depriving persons of liberty in certain circumstances without violating the "due process of law" guaranty. Certain Mexican revolutionists, who crossed the American border and were interned in accord with Article II of the Vth Hague Convention of 1907, sought to show that the treaty provision was void as in violation of the Fourth, Fifth and Sixth Amendments. The Circuit Court of Appeals upheld the treaty,<sup>71</sup> holding that Amendments Four and Six had no relation to the case, and that the "due process of law" required by the Fifth Amendment had been observed by complying with the terms of the treaty, which by the Constitution was itself law.

<sup>68</sup> Mr. Marcy, Secretary of State, to Mr. Mason, Jan. 18, 1855, Moore, 5: 167.

<sup>69</sup> Treaties, United States and Greece, 1902; United States and Spain, 1902, Malloy, Treaties, pp. 855, 1701; Sen. Doc., No. 357, 61st Cong., 2nd Sess.; Corwin, *op. cit.*, p. 15.

<sup>70</sup> *Dicta* of Justice Brown in *Downes v. Bidwell*, 182 U. S. 244, 282; *Dorr v. U. S.*, 195 U. S. 138.

<sup>71</sup> *Ex parte Toscano*, 208 Fed. Rep. 938.

Furthermore, the prohibitions apply only to acts affecting persons within the United States,<sup>72</sup> as was said by the Supreme Court:

By the Constitution a government is ordained and established "for the United States of America" and not for countries outside of their limits. . . . When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither being obligatory upon the other.<sup>73</sup>

Thus the treaty power can provide for exercising judicial authority extr territorially without reference to the constitutional guaranties.

Finally, it should be noted that the treaty-making power may deprive individuals of inchoate rights against foreign governments by providing for the cancellation of all claims for a lump sum. Such conventions have been upheld in the courts,<sup>74</sup> but they can not be said to deprive an individual of a guaranteed constitutional right, because the Constitution can guarantee no more than the government can obtain.<sup>75</sup>

Thus, while a treaty would be void if manifestly violating any of the express prohibitions of all governmental authority, as would be the case if individuals were deprived of guaranteed rights within the United States, yet judicial practice indicates that ordinarily an

<sup>72</sup> The XIIIth and XVIIIth Amendments apply to the United States and territory "subject to the jurisdiction thereof," and it has been suggested that other guaranties, such as that of "due process of law" in the Vth Amendment, may apply equally extensively (Brown, J., in *Downes v. Bidwell*, 182 U. S. 244, 282). In other sections "The United States" means only the States and incorporated territory (jury trial in VIth Amendment; *Dorr v. U. S.* 195 U. S. 138; *Rasmussen v. U. S.* 197 U. S. 516); while in still other sections it refers only to the States (organization of judiciary, Art. III, sec. i; *American Insurance Co. v. Canter*, 1 Pet. 511). It has been suggested that an immigrant "although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate," and hence is not entitled to the constitutional guarantees (*U. S. v. Ju Toy*, 198 U. S. 253, 1905).

<sup>73</sup> *In re Ross*, 140 U. S. 453, 464 (1890).

<sup>74</sup> *Comegys v. Vasse*, 1 Pet. 193 (1828).

<sup>75</sup> Corwin, *op. cit.*, p. 16.

apparent conflict of this character would be resolved by interpretation.

In summary, it may be said that, while treaties in conflict with the Constitution are void, such a conflict can only occur in case one of the express prohibitions directed to all authorities of the national government is disregarded. Neither the "reserved rights" of the States, nor the prerogatives of other departments of the national government,<sup>75a</sup> could render a ratified treaty void, for the authority to bind the nation in reference to all legitimate objects of international negotiation is given exclusively and in full to the national treaty power. Treaties made "under the authority of the United States" are the "supreme law of the land."<sup>76</sup>

The classical statement of the Supreme Court in *Geofroy v. Riggs* is in point:

That the treaty-power in the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. . . . The treaty-power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and that arising from the nature of the government itself and that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter without its consent. But, with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.<sup>77</sup>

This quotation indicates that the treaty-making power is limited only with reference to the *ends* for which it may act. The *means* which the Constitution provides for performing functions which may be required by a treaty do not limit the power. The intent or end of the instrument must be to promote international welfare, national

<sup>75a</sup> "Treaties and the Constitutional Separation of Powers in the United States," this JOURNAL, 12: 64.

<sup>76</sup> Art. VI, sec. 2.

<sup>77</sup> *Geofroy v. Riggs*, 133 U. S. 253 (1890). "The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments." *In re Ross*, 140 U. S. 453 (1890).

welfare, and individual welfare. In other words, (1) the treaty must be international in character, not a mere subterfuge for domestic regulations;<sup>78</sup> (2) it must be in pursuance of the fundamental objects of the Constitution, "to promote the general welfare" of the people of the United States,<sup>79</sup> and (3) it must not interfere with the rights guaranteed to individuals within the United States against all interference by the national government.<sup>80</sup> Whether the first two requirements are fulfilled is distinctly a political question entrusted to the responsibility of the treaty power itself. The last alone is a legal question which might furnish grounds for a judicial declaration of unconstitutionality.

The means to be employed in executing a treaty are generally indicated by the Constitution according to the kind of acts necessary, and legislative, executive, judicial action or all three may be required. While a treaty is spoken of as "self-executing" only in case private individuals are immediately responsible,<sup>81</sup> and hence judicial application in concrete cases is the only official action needed to enforce it, yet all treaties might be called "self-executing" in the sense that their formal conclusion imposes an immediate responsibility

<sup>78</sup> "The treaty-making power . . . can not be employed with reference to matter not legitimately a subject for international agreement." (W. W. Willoughby, *The Constitutional Law of the United States*, N. Y., 1910, 1: 504.) "By the general power to make treaties the Constitution must have intended to comprehend only those objects which are usually regulated by treaty and can not be otherwise regulated." (Jefferson, *Manual of Parl. Practice*, sec. 52.) See also, Corwin, *op. cit.*, pp. 19, 122, 226; Root, this JOURNAL, 1:278; Anderson, this JOURNAL, 1: 639; Wright, this JOURNAL, 12: 93.

<sup>79</sup> Preamble of Constitution; Anderson, this JOURNAL, 1: 639.

<sup>80</sup> *Supra*, note 61.

<sup>81</sup> Treaties being the "law of the land," all provisions affecting individuals impose an immediate responsibility upon them to observe such provisions. The responsibility of private persons has sometimes been insisted upon in the treaty itself. "If any one or more of the citizens of either party shall infringe any of the articles of this treaty, such citizens shall be held personally responsible for the same, and the harmony and good correspondence between the nations shall not be interrupted thereby; each party engaging in no way to protect the offender or sanction such violation." Treaty with Colombia, 1846, Art. 35, sec. 4. See also treaties with Brazil, 1828, Art. 33, sec. 2; Bolivia, 1858, Art. 36, sec. 2; Peru-Bolivia, 1836-1839, Article 30, sec. 2; Peru, 1851-1863, Art. 40, sec. 2. See also this JOURNAL, 20: 713, 730.

ity upon every governmental authority whose action may be necessary to give it complete effect.<sup>82</sup> Thus, the mere fact that an independent organ of government is called upon to act can not impeach the constitutionality of the treaty. Question could not arise unless the treaty itself prescribed means for its own execution contrary to those required by the Constitution. The point as raised in the case of treaties establishing international courts and institutions has been sufficiently discussed.<sup>83</sup> Suffice it to say that no case appears to have involved an actual departure from the procedure required by the Constitution, and none is likely to do so, for the fact that a form of procedure or an institution for executing the treaty was established in the instrument itself, would create the presumption that the ultimate objects of the treaty required the action of authorities with powers dependent upon international agreement, and hence beyond the scope of any merely national organ,<sup>84</sup> and beyond the possibility of conflicting with the prescribed powers of such an organ.

#### EUROPEAN STATES

Although constitutions are not law in countries other than the United States,<sup>85</sup> the constitutionality of treaty provisions that violate individual rights or invade the autonomy of governmental units, may require consideration as a political question. In Great Britain, a treaty can not deprive Englishmen of constitutional rights, because an instrument negotiated by the crown and affecting private rights has no legal validity until put in force by an enabling Act of Par-

<sup>82</sup> See this JOURNAL, 12: 93.

<sup>83</sup> *Ibid.*, 12: 70-72.

<sup>84</sup> *In re Ross*, 140 U. S. 453 (1890). See also, this JOURNAL, 12: 71.

<sup>85</sup> In most European countries, constitutions are directory in character, each independent organ of government having the final decision on its own competence to act. Thus in France, Germany and Great Britain, a statute promulgated with formal correctness can not be questioned on the score of constitutionality. The legislature in passing it and the executive in promulgating it, have given an ultimate decision that it is valid. The same is true of treaties. Ratification and promulgation with formal regularity is ultimate evidence that the instrument is valid, although this does not mean that it is necessarily a source of law cognizable in the courts. See this JOURNAL, 10: 709 *et seq.*

liament.<sup>86</sup> In most of the continental European countries, treaties affecting private rights require assent of both houses of the legislature before they become cognizable by the courts.<sup>87</sup>

Although the autonomy of local units does not impose any legal limits upon the treaty power in Europe, yet in practice the treaty power itself usually recognizes and respects the constitutional rights of such autonomous units. The unwritten constitution of Great Britain recognizes certain matters as within the local competence of the self-governing and other colonies, and in treaties dealing with such subjects provision is usually made for ratification by each colony before the treaty becomes operative for that territory.<sup>88</sup> A conflict, however, could not come before the courts, because the treaty provision, if law at all, would be so because incorporated in an Act of Parliament, which would unquestionably prevail in any court.

In both Germany and Switzerland there has been doubt of the competence of the national government to conclude treaties on subjects within the legislative power of the States or Cantons, but, as in the United States, practice appears to have settled in favor of this authority. In these countries there is a stronger argument than in

<sup>86</sup> *Walker v. Baird*, App. C. (1892), 491, 497. A resolution requiring that all treaties be laid before both houses of Parliament before being ratified was proposed in 1873 (Hansard, 214: 440, 1166, 1178, 1309, 1319) but not carried. Premier Asquith, in 1908, thought such submission not necessary (Hansard, 197: 701), though Lord Grey stated, in 1911, that such "momentous" treaties as the American arbitration treaties of 1911 would require Parliamentary sanction (Hansard, 22: 1990). Parliament, as a matter of fact, has always passed enabling acts to give effect to treaties affecting private rights either before or after ratification, and occasionally the treaty itself makes its effectiveness dependent upon such action by Parliament, Xth Hague Convention, 1907, Art. 21. See Crandall, *op. cit.*, p. 280 *et seq.* and this JOURNAL, 10: 709, 716.

<sup>87</sup> Crandall, *op. cit.*, p. 314 *et seq.*, this JOURNAL, 10: 713 *et seq.*

<sup>88</sup> Cobbett, *Cases on International Law*, London, 1909, 1: 53; Todd, *Parliamentary Government in the British Colonies*, 2nd ed., p. 266; Tupper, "Treaty Making Powers of the Dominions," *Journ. Comp. Leg.*, 17: 5. For treaties allowing such assent by the colonies, between Great Britain and the United States, see Convention as to Tenure and Disposition of Real and Personal Property, 1899, Art. IV; Arbitration treaty 1908, Art. II, Malloy, *Treaties*, pp. 775, 814. British colonies have frequently been parties to general international conventions, as that for the publication of customs tariffs, 1890, Malloy, p. 1996. See also D. P. Myers, *Representation in Public International Organs*, this JOURNAL, 8: 96.

the United States for excluding such matters from the national treaty power, because the individual States still retain a limited power to conclude treaties. Thus Laband<sup>89</sup> thought the treaty-making power in Germany was subject to the same constitutional division between Empire and States as the legislative power, and there has been judicial authority for this view.<sup>90</sup> As the legislative power of the central government was much more comprehensive than in the United States, this limitation would not be important; but Kaufmann<sup>91</sup> doubts whether such a limitation exists at all, in support of which he points out a number of imperial treaties actually in force regulating matters within State competence.<sup>92</sup>

In Switzerland the Bundesgericht decided in 1883<sup>93</sup> that the national government was competent to conclude treaties even on subjects within the exclusive legislative competence of the Cantons, and writers on Swiss constitutional law have voiced the same opinion.<sup>94</sup> In Switzerland and Germany, however, as the Constitutions are not enforceable as law in the courts, a conflict could not, in any case, come before the courts.

QUINCY WRIGHT.

<sup>89</sup> Paul Laband, *Das Staatsrecht des Deutschen Reiches*, 3d ed., 1: 639.

<sup>90</sup> *Urtheilen des Deutsches Reichsgerichts*, July 23, 1890, *Ent.*, 26: 123.

<sup>91</sup> Kaufmann, *Die Rechtskraft des Internationalen Rechtes und das Verhältnisse des Staatsorgans zu demselben*, Stuttgart, 1899, p. 53. See also *Urtheilen des Deutsches Reichsgerichts*, November 3, 1884, *Ent. Str.*, 1: 234, 236.

<sup>92</sup> Railroad Freight treaty, Netherlands, November 28, 1892, Art. 10, Marten's *N. R. G.*, II, 19: 900; Canal treaties, Belgium, France, October 8, 1887, *ibid.*, II, 15: 747; Fisheries treaties, Netherlands Switzerland, June 30, 1885, *ibid.*, II, 11: 561.

<sup>93</sup> *Urtheilen des Schweiz Bundesgerichts*, April 9, 1882, *Ent.*, 9: 178.

<sup>94</sup> Blumer, *Handbuch des Schweiz Bundesstaatsrechts*, 3d ed. (Morel), 1: 239, cited Kaufmann, *op. cit.*, p. 53.

## THE LAW OF ANGARY

### I. ORIGIN

THE origin of the right of angary is traceable to early Roman times, and a study of its origin and development throws much light on the right as it is understood today. Several writers on international law refer to the first chapter, 41st verse, of Saint Matthew's Gospel, as showing a possible origin of the term angary. This verse reads:

*Quicumque te angariaverit mille passus, vade cum illo et alia duo.*  
(And whosoever shall compel thee to go one mile, go with him two.)

The Greek word for compel or force is also cited, and it is clear that the idea of compelling some service was linked up with the early notion of angary.

The following passage from the Justinian Code (529 A.D.) shows the word angary in its noun form, and shows that all classes alike were subject to the law:

*Nullus penitus cuius libet ordinis seu dignitatis, vel sacrosancta ecclesia, vel domus regia tempore expeditionis excusationem angariarum seu pa-angarium habeat.*<sup>1</sup>

The distinction between angary and parangary is that the latter term connotes services over and above those actually required or forced, that is, extra services. The forced services included the furnishing of wagons and teams for public undertakings, such as for the post and for the transport of grain to the common distribution point. Naturally it came to embrace the seizure of vessels for public purposes, and we find that both Huber and Loccennius refer to Book II, Tit. 56 of the Book of Feudalism, which had absorbed the angary

<sup>1</sup> *Corpus Juris Civilis*, Lib. XII, Tit. LI, art. 21, p. 772 Hermanni ster. edit. Leipzig, 1843.



clauses from the constitution of 1153, granted by Frederick I as a code for the Italians. Huber says:

*In Iure autem Feudali d. tit. 56 ut & sequiori ævo, per angarias & parangarias designantur quælibet operæ, maxime vectoriæ, Frohnen mit Führen und Pferden, An- und Vorspann, quanquam in d. t. 56 non plene recenseantur omnia Regalia, ne quidem, Minora.*<sup>2</sup>

Loccennius:

*Has angarias imponere possunt navibus ille principes et respublicæ, quæ iura maiestatis habent. Inter regalia enim referunter quoque navium præstationes, in c. un. quæ sint regalia lib. 2 feud. tit. 56.*<sup>3</sup>

Here we see that a rough distinction between the prestation of ships and the prestation of wagons and teams, but the angary of vessels is firmly recognized. Kuricke did not believe a distinction necessary or useful. He says:

*Sunt qui cum Peckio et alias distinguunt, utrum onus nautum, an vero universatatem, respiciat, et hoc posteriori casu æquum esse putant, per eam succurri. Sed sicut distinctio hæc obscuritate non caret, ita rationem diversitatis me non capere ingenue profiteor.*<sup>4</sup>

It is thus seen that the right of angary had its origin in the demand by the Roman authorities for private property and personal services for necessary public purposes, and that it came to apply to ships. At least, as early as the twelfth century the right referred primarily to ships and lost its other meanings.

## II. TREATIES RELATING TO THE EXERCISE OF THE RIGHT OF ANGARY.

That the exercise of the right of angary was found in the seventeenth century, and that the right was much abused, may be surmised from the character of the treaties which were signed in that period. In the first place, it is clear that vessels must have been seized for almost any purpose. This is shown by the prohibitory clauses appearing in three of the treaties, stating that the vessels of the contracting parties shall not be seized "under pretence that he has occasion for

<sup>2</sup> *De Iure Civitatis* (1752), p. 203.

<sup>3</sup> *Iure Maritimo et Navali*, Cap. V. Lib. III, p. 927 Heinnecius ed. Magdeburg. 1740.

<sup>4</sup> *Ius Maritimum Hanseaticum*, p. 887; Heinnecius ed. Magdeburg, 1740.

them;" "*pour quelque cause que ce soit*;" "*ni de transporter quelque chose*." In the second place, clauses from these treaties show that the personnel of the vessels were seized with their ship and forced to serve with it. Thus it is prohibited to the contractants to seize "*les maîtres, pilotes, matelots*," or, the "mariners or merchants."<sup>5</sup>

So strong was the opposition to the exercise of the old right that in the Pyrenees Treaty it is provided that vessels shall not be seized "*meme sous pretexte de s'en vouloir servir pour la conservation et defense du pays*."<sup>6</sup> The English-Portuguese Treaty of July 10, 1654, provides:

Art. IX. The King of Portugal shall not detain any of the republic's ships, merchants, or mariners, under pretence that he has occasion for them, without the consent of the Protector, or of those concerned.<sup>7</sup>

Article eleven of the Danish-French Treaty of 1645, provides:

*Les vaisseaux de guerre ou marchands ne seront pas contraints d'aller en guerre, ni de transporter quelque chose, sans le consentement de leur souverain, des maîtres ou propriétaires de navire.*<sup>8</sup>

The requirement of the consent of the owners of the vessels in the case of the two last-mentioned treaties is equivalent to denying the right of angary.

The clause of the Danish-French Treaty cited above was renewed as Article 30 of the treaty of August 23, 1742.<sup>9</sup> The right of angary is denied by the Holland-Naples Treaty of 1753, and the United States-Morocco Treaty of July 18, 1787, Article 19. Article 8 of the United States-Netherlands Treaty of January 22, 1783, which was abrogated in 1795 upon the overthrow of the Netherlands Government, provides:

Merchants, masters and owners of ships, mariners, men of all kinds, ships and vessels, and all merchandizes and goods in general, and ef-

<sup>5</sup> Moetjens et Van Bulderen,—*Recueil des Traités de Paix*, Vol. IV, p. 775 (1700).

<sup>6</sup> *Ibid.*

<sup>7</sup> Jenkinson, C. "Collection of Treaties between Great Britain and Other Powers" (1785), p. 72.

<sup>8</sup> Dumont, VI, 329.

<sup>9</sup> Clercq, *Recueil des Traités de la France*, p. 54.

fects of one of the confederates, or subjects thereof, shall not be seized or detained in any of the countries, lands, islands, cities, ports, places, shores, or dominions whatsoever of the other confederate, for any military expedition, publick or private use of any one by arrests, violence, or any color thereof.<sup>10</sup>

This clause is very comprehensive and makes clear that the right of angary is not to be exercised by the contractants. Other seventeenth century treaties denying the right of angary are the United States-Prussian Treaty of 1785, Article 16; the French-Russian Treaty of 1787, Article 24; and Article 7 of the United States-Spanish Treaty of 1796.

With the treaty of 1799 between the United States and Prussia, the right of angary entered upon a new phase.

As a result of the Napoleonic Wars, the place of the right of angary in international law was radically changed. The change came about from the precedent established by Napoleon in 1798. In the midst of his wars, he, as head of the Directorate, issued an order which provided for the requisitioning of ships in the French ports of Vecchia, Nice, Marseilles, and others. Among the vessels so requisitioned for the transport of troops to Egypt, were several neutral vessels.

With this precedent freshly in mind, the negotiators of the treaty of July 11, 1799, between the United States and Prussia, drew up, as Article 16, the first treaty stipulation expressing a new interpretation of the right of angary, that is, that the right might be exercised in cases of urgent necessity if full indemnity is paid to the injured party. This article provides:

. . . in times of war, or in cases of urgent necessity, when either of the contracting parties shall be obliged to lay a general embargo, either in all its ports or in particular places, the vessels of the other party shall be subject to this measure, upon the same footing as the most favored nations, but without having any right to claim the exemption in their favor stipulated in the 16th article of the former treaty of 1785. But on the other hand, the proprietors of the vessels which shall have been detained, whether by some military expedition or for what other purpose soever, shall obtain from the government that shall have employed them, an equitable indemnity, as well for the freight as for the loss occasioned by the delay.<sup>11</sup>

<sup>10</sup> Malloy, II, 1236.

<sup>11</sup> United States Statutes at Large, VIII, 384.

The angary clause of the 1799 treaty was renewed as Article 12 in the treaty of 1828 between the same parties. With the exception of the Danish-Prussian Treaty of June 17, 1818, and two Italian treaties with San Domingo and Nicaragua, October 18, 1886, and June 25, 1906, all of the nineteenth and twentieth century treaties allow the exercise of the right of angary with full indemnity. Article 12 of the Danish-Prussian Treaty provides that no vessels of the subjects of the contractants shall "*zum Kriegsdienste oder zu irgendeinem andern Transport wider seinem Willen, gezwungen werden.*"<sup>12</sup> Article 5 of the Italian-Nicaraguan Treaty provides:

*I cittadini di ambe le Parti contraenti non potranno essere sottoposti rispettivamente a sequestri od embargos, per ragioni di Stato, ne per spedizioni militari ne per causa di uso pubblico di veruna sorte; ne potranno essere tratti con i loro bastimenti, equipaggi, mercanzie od oggetti commerciale per eguali motivi.*<sup>13</sup>

This treaty does not allow the exercise of the right of angary for a military expedition or for any public purpose.

Having considered the conventional stipulations relating to angary, a tabular comparison of the conventions for the different centuries, so far as they concern angary, is interesting and illuminating. It must be borne in mind that the seventeenth and eighteenth century treaties, excepting the United States-Prussian Treaty of 1799, relate to the old right. The classification of a treaty as favorable to the exercise of the right, means of course, favorable if adequate indemnity is paid.

#### CLASSIFICATION OF TREATIES

Seventeenth century .....	3	unfavorable		
Eighteenth century .....	7	"	1	favorable
Nineteenth century:				
Before 1870 .....	1	"	12	"
After 1870 .....	1	"	16	"
Twentieth century .....	1	"	2	"

Six of the nineteenth century treaties are between the United States and Central or South American Powers. In only one of these,

<sup>12</sup> *Gesetzsammlung für die preussischen Staaten* (quoted by Albrecht, p. 39).

<sup>13</sup> De Martens, *Nouveau Recueil de Traités*, XXXV, 270.

the treaty with Peru of 1874, is indemnity required in advance. Several of the French and German treaties with these Powers require indemnity in advance. A typical French treaty is that with Nicaragua, April 11, 1859, of which Article 7 provides:

*Les sujets et citoyens de l'un et l'autre Etat ne pourront être respectivement soumis a aucun embargo, ni être retenus avec leurs navires, équipages et cargaisons et effets de commerce pour un expédition militaire quelconque, ni pour quelque usage public ou particulier que ce soit, sans qu'il soit immédiatement accordé aux intéressés une indemnité suffisante pour cet usage, et pour les torts et les dommages qui, n'étant pas purement fortuits, naîtront du service auquel ils son obligés.*<sup>14</sup>

We may conclude without hesitation that the modern treaties recognize the right of angary for military and other urgent public purposes. The question arises, however, as to the status of the right in the absence of treaty stipulation. In this case is it exercisable at all, and if so, is compensation due? Speaking in the House of Commons, William Pitt said: "The very circumstance of making an exception by treaty proves what the law of nations would be if no such treaty were made to modify or alter it."<sup>15</sup>

Considering 48 Powers in the world, there would be a possibility of 1,128 treaties on any given subject, provided each Power made a treaty with every other Power. As a matter of fact, only about 42 treaties have been made concerning the right of angary. Following Mr. Pitt's reasoning, we would have to conclude that, in the absence of treaties, the Law of Nations would permit a belligerent to seize neutral vessels, and even neutral subjects, for a military expedition or some other public or even private purpose without obligation as to compensation or indemnity, for which all the nineteenth and twentieth century treaties, with three exceptions, and possibly others, provide. We are thus driven into a dangerous position, for it would hardly be held by an authority on international law that a belligerent had such rights.

The reasoning just followed is unsound because it fails to recognize

<sup>14</sup> De Clereq, *Recueil des Traités*, VII, 588.

<sup>15</sup> Speeches, III, 327.

important factors which must enter. In the first place, it makes a tremendous amount of difference if the 42 treaty exceptions are made by Powers of small weight in international affairs or by some of the great Powers. Obviously, San Marino and Liberia when agreeing by treaty to do or not to do something, do not have as much weight in making or unmaking international law as when the United States and Great Britain are concerned. A second reason for the inadequacy of this method of reasoning is that conventional stipulations are often made, not as making an exception to international law, but in confirming it, that is, international law is declared but not amended. Such stipulations serve as abundant precaution. Thus it is very doubtful if a specific stipulation is necessary to prevent France, for example, from forcing subjects of the United States to take part in a French military expedition, or to provide for compensation in case American vessels were used, assuming of course that the United States was neutral.

Finally, then, the inevitable conclusion is reached that the right of angary exists, even in the absence of a treaty recognizing it, but that a treaty renders the position of the affected neutral more secure as regards indemnity or compensation which might be given without the treaty. This has indeed been the case in the three notable exercises of the right, viz., by Napoleon I in 1798, by Prussia in 1870, and by the United States, Great Britain and other Powers during the present war.

Some authorities touch upon this point. Perels holds that both merchant vessels and their crews belonging to a neutral Power may be used by a belligerent in the absence of a treaty to the contrary. (*soweit solche nicht conventionell ausgeschlossen sind*)<sup>16</sup> Hall believes that "it is possible that a right to compensation might be generally held to exist apart from treaties."<sup>17</sup> It is certainly not to be concluded, says Dr. Albrecht, that the German treaties placed German vessels in a worse position with regard to the other contracting Powers than they were allowed by existing international law.<sup>18</sup> Basdevant says of the nineteenth century treaties that they "*n'ont évidemment pas eu*

<sup>16</sup> *Das internationale öffentliche Seerecht der Gegenwart*, p. 236.

<sup>17</sup> *International Law*, p. 813 (7th edition).

<sup>18</sup> "*Requisitionem von neutralem Privateigenthum*," *Zeitschrift für Völkerrecht und Bundesstaatsrecht* (1912), Beiheft I, p. 44.

*pour objet d'empirer les conditions de la navigation en créant un droit de réquisition qui n'existerait pas auparavant.*"<sup>19</sup>

## II. CLASSIFICATION OF AUTHORITIES.

A very interesting and illuminating phase of this study has been furnished by a classification of the opinions of writers on international law who have treated the subject of angary. Not only does it serve to clear up the uncertainty which has existed as to the strength of opinion which allows the right, but it also serves, when taken in connection with the classification of treaties, to give a fairly accurate estimate of the status of the right in international law.

In making this classification, two important points have been borne in mind. First, that those authorities who wrote before 1798 generally were writing of the old right which included the seizing of the personnel of the vessels, hence their opinions are not to be placed in the same category as those who wrote later. In the second place, a writer's view on a given subject must be weighed or tested in connection with all that he has to say on that subject in order that his true meaning may be ascertained. The subject under consideration is of such completeness in itself, however, that the various views admit of a rough classification. It cannot, of course, be absolute, but serves as a fairly accurate guide.

Grotius, writing in the early seventeenth century, believed that only the greatest necessity gives one neighbor or state preference in the use of the other's goods, and then such preference does not exist if the owner has an equal need for it; that if the custody of a thing suffices, it is not necessary actually to use it; that if the usage is sufficient, it is unnecessary to claim the right to dispose of the goods, but if a disposal is made the owner should be compensated.

*Sed quia occasione belli multa in eos, finitimos præsertim patrari solent prætexta necessitate, repetendum hic breviter quod diximus alibi, necessitatem ut ius aliquod det in rem alienam summam esse debere: requiri præterea, ut in ipso domino par necessitas non subsit:*

<sup>19</sup> "La Réquisition des Navires Allemands," *Revue de Droit International*, XXIII (1916), 278.

*etiam ubi necessitate constat, non ultra sumendum, quam exigit id est si custodia sufficiat, non sumendum usum, si usus, non sumendum abusus si abusu sit opus restituendum tamen pretium.*<sup>20</sup>

It has been thought useful to divide the authorities into four classes: (1) those who admit the right of angary, provided indemnity is paid and it is exercised in case of urgent or extreme necessity. In this class also are placed those who admit the right without limitation of necessity but require indemnity. Writers in this category are classed as favorable.

(2) Writers who are less emphatic in admitting the right or who limit or qualify it; these are classed as favorable with qualifications.

(3) Writers who oppose the right. Such authorities are classed as unfavorable.

(4) There is a fourth group of authorities who merely define the right or refer to other opinions. These are classed as non-committal.

On account of the exercise of the right by Prussia in 1870, a separate list is made of those writers who wrote before 1870 and those who came after that date.

With this explanation, we may proceed to group authorities as follows:

#### CLASSIFICATION OF AUTHORITIES

	Before 1870	After 1870	Total
Favorable .....	8	42	50
Favorable with qualifications.....	1	7	8
Unfavorable .....	2	16	18
Noncommittal .....		3	3

It is thus seen that of 79 authorities who treat the subject of angary, a good majority admit that the right may be exercised, if indemnity or compensation is paid. Even if those who admit the right with qualifications or limitations are classed with those who oppose, the number would still be only 26 as against 50 who are favorable. If then, the facts here shown are connected with those shown in the classification of treaties—in the nineteenth and twentieth centuries, it ap-

<sup>20</sup> *De Iure Belli ac Pacis*, Book III, Ch. 17.



pears that out of 31 treaties relating to angary, only three prohibit the exercise of the right if indemnity is paid, or arranged in advance—the conclusion may safely be made that so far as these sources contribute to the making of international law, the right of angary exists and is exercisable.

Many able writers are to be found on each side of the question. Those in class one are: Albrecht, Azuni, Baker, Basdevant, Beawes, Bentwich, Bevilacqua, Bluntschli, Borchard, Bordwell, Boucher, Bry, Calvo, Cobbett, Cruchaga, Davis, DeCussy, Despagne, Ferguson, Funck-Bretano et Sorel, Geffken, Glass, Glenn, Hall, Halleck, Heffter, Higgins, Holland, Holtzendorf, Kent, Larrañ, LeMoine, Liszt, Martens, Molloy, Oppenheim, Owen, Pehedeki, Perels, Phillimore, Philipson, Poinsard, Poortugael, Resch, Spaight, U. S. Naval War Code (1900), Vattel, Westlake, Woolsey.

In class two appear: Attlmayr, Bonfils, DeMartens, Foignet, Gessner, Guelle, Massé, Olivart.

In class three appear: Carnazza-Amari, Chretien, Dana, De Negrin, Fiore, Hautefeuille, Institute of International Law by Resolution in 1898, Kleen, Kluber, Lawrence (T. J.), Leray, Merignhac, Neumann, Piédelièvre, Pradier-Fodéré, Quaritsch, Testa.

In class four appear: Latour, Risley, Wilson and Tucker.

Dr. Albrecht is one of the strongest supporters of the right, holding that it exists, not only when the existence of the state depends upon its exercise, but even in case of customary military necessities. He believes that neutral vessels in the waters of a belligerent are subject to extraordinary measures adopted by the belligerent:

*Vielmehr dürfte die richtige Konstruktion wohl folgende sein: Fremde Schiffe sind während ihrer Anwesenheit im Gebiete eines anderen Staates der Hoheit desselben unterworfen, und damit auch allen Massnahmen die er infolge von aussergewöhnlichen Umständen für nötig befindet. Deshalb können neutrale Schiffe, die sich auf dem Gebiet des Kriegführenden befinden, auch solchen Massregeln unterworfen werden, also sowohl Requisitionen für Dienstleistungen, wie auch Requisitionen zu sonstigen Verwendungen, die zur Zerstörung des Schiffes führen. Massgebend sind hierfür die Normen des Landesrechts, das den Begriff der Militärischen Notwendigkeit zugrunde legen muss.*<sup>21</sup>

<sup>21</sup> "Requisitionem," etc., p. 61.

Bluntschli allows the exercise of the right in case of military necessity, provided ample indemnity is paid:

*Die neutralen Schiffe können sich innerhalb des Kriegsfeldes den Massregeln aus militärischer Notwendigkeit nicht entziehen: aber die Kriegspartei, welche dieselben aus solchen Grunde angreift, ist zu voller Entschädigung der verletzten Privateigenthümer verpflichtet.*<sup>22</sup>

Although calling the right an imperfect one (*droit imparfait*), Calvo admits its exercise in case of a foreign war, for defense, or for the safety of the state.<sup>23</sup> De Cussy believes that the right is exercisable in case of necessity, and that it is a prerogative of sovereignty.<sup>24</sup> Despagnet takes an extreme position in favor of the belligerent: "*l'angarie subsiste encore en cas de guerre, les navires neutres étant soumis aux lois de nécessité et d'ordre public comme les navires nationaux. Une indemnité n'est même pas due, en principe. . .*"<sup>25</sup> This is one of the few opinions which allows a belligerent to use neutral vessels without indemnity; but, of course, in stating that indemnity is not due in principle, this author would leave the question of its payment to the discretion of the belligerent which exercised the right. In this view he is in agreement with Geffken, who holds that no right to indemnification is possessed by the neutral unless there is a special treaty requiring it.<sup>26</sup>

The careful English writer, A. P. Higgins, recognizes the right under special circumstances, involving self-preservation: "The laws of war allow a belligerent, as in the case of the Right of Angary, not only to destroy or appropriate enemy property, but under special circumstances give him a right to do the same to neutral property."<sup>27</sup> Kent admits it in case of "strong necessity." Oppenheim believes that under certain exceptional circumstances "the belligerent has the right to appropriate neutral property."<sup>28</sup>

<sup>22</sup> *Das moderne Völkerrecht*, Art. 795.

<sup>23</sup> *Le Droit International*, Art. 1277.

<sup>24</sup> *Phases et Causes Célèbres*, Vol. I, p. 121.

<sup>25</sup> *Cours de Droit International Public*, 530.

<sup>26</sup> *Le Droit International de l'Europe* (Bergson trans.), fn. p. 356.

<sup>27</sup> *War and the Private Citizen*, 104-5.

<sup>28</sup> *Commentary on International Law* (Abdy ed.), 299.

The view of Phillimore is particularly interesting in that it was cited by Bismarck in 1871:

It (angary) is an act of state, by which foreign as well as private vessels which happen to be within the jurisdiction of the state, are seized upon; and compelled to transport soldiers, ammunition, or other instruments of war; in other words, to become parties against their will to carrying on direct hostilities against a Power with whom they are at peace. The owners of these vessels receive freight beforehand. Such a measure is not without the sanction of practice and usage, and the approbation of many good writers upon international law; but if the reason of the thing and the paramount principle of national independence be considered, it can only be excused, and perhaps scarcely then justified, by that clear and overwhelming necessity which would compel an individual to seize his neighbor's horse or weapon to defend his own life.<sup>29</sup>

He then emphasizes the important influence of usage in international law.

The eminent Dutch writer, Poortugael, holds that the right is exercisable only in case of urgent military necessity (*dringende oorlogsnoodzaak*), and requires full indemnity (*volledige Schadeloosstelling*).<sup>30</sup>

Although the opponents of the right of angary are comparatively few in number, they are for the most part eminent authorities on international law. Kleen has been a consistent opponent of the right, particularly in the sessions of the Institute of International Law, 1898. An expression of his view, 1900, follows:

*Quant aux navires, aux moyens de transport et autres biens meubles, un belligérant n'a pas plus qu'un autre Etat quelque droit d'exproprier l'étranger: il ne peut donc à aucune condition disposer de la propriété mobilière d'un neutre pour la guerre. Que s'il le fait, cela ne peut être pardonné que delit, non pas disculpé et moins encore justifié. D'ailleurs les neutres n'étant pas plus obligés de se prêter aux buts des belligérants que ceux-ci aux buts ceux-la, rompraient, en le faisant, leur neutralité, à l'égard de la partie adverse dans la guerre.*<sup>31</sup>

The outstanding English opponent of the right is T. J. Lawrence, who is uncompromisingly against its exercise:

The seizure of such vessels (merchant) and their use for purposes

<sup>29</sup> International Law, III, 84-85.

<sup>30</sup> *International Maritime Recht*, p. 413.

<sup>31</sup> *Lois et Usages de la Neutralité*, II, 72.

of transport was not uncommon in the seventeenth century or altogether unknown in the eighteenth. Some authorities regard it as possible today. But the whole trend of recent international action shows that it is obsolete in its most vexatious form of a wholesale embargo on neutral shipping. No recent case of such a high-handed proceeding is to be found. Treaty after treaty forbids it. The assertion of the so-called right is always coupled with an admission that compensation must be made for its exercise. We may imagine how fiercely it might be resented if we contemplate for a moment what would be the consequences of, say, the seizure by the United States of all liners in the port of New York in order to carry to its destination an expedition against a Central American Republic hastily planned in a sudden emergency. Moreover, it is difficult to see why vessels alone should be taken. Why not specie also, or cargoes of arms and ammunition, or indeed anything the belligerent is in need of for warlike purposes? The practice, if good at all, is good for whatever an army or navy may require. But in truth it is so indefensible that it is now scarcely defended. Belligerents must make war with their own resources and what they can capture from the enemy, not with neutral property which is unfortunate enough to be for the moment in their power.<sup>32</sup>

It is necessary to take exception to this view and to point out that it is not in complete harmony with the facts. It has been shown that authorities are about two to one in favor of the right, provided indemnity is paid; nor does the right properly embrace a "wholesale embargo on neutral shipping." Moreover, only three of the treaties examined for the nineteenth and twentieth centuries forbid the exercise of the right if indemnity is paid. It ought also to be said that far from being scarcely defended, it is defended by most authorities, by treaties, and was extended by The Hague Conventions of 1899 and 1907 to apply to railway materials.

Fiore calls the right a *pretendu droit*, and states that it is recognized by certain treaties in the fifteenth and sixteenth centuries. If such treaties existed in these two centuries, they are referred to by none of the early writers, and the fact that with the exception of the Prusso-American Treaty of 1799, all of the seventeenth and eighteenth century treaties specifically denied the right, would lead to the conclusion that unless treaties for the fifteenth and sixteenth centuries are cited, they probably did not exist.

<sup>32</sup> Principles of International Law, pp. 627-628 (Boston, 1910).

The Institute of International Law by resolution in 1898 declared against the right: "Art. 39.—*Le droit d'angarie est supprimé, soit en temps de paix, soit en temps de guerre, quant aux navires neutres.*"<sup>32</sup>

A firm stand against the right is taken by Pradier-Fodéré:

*Que l'angarie ait lieu en temps de guerre et pour des services de guerre, ou en temps de paix pour un service d'utilité elle n'est qu'un abus de la force. . . . On invoquera le prétendu droit de la nécessité? Mais ce droit n'existe point: il n'est qu'un expédient imaginé pour légitimer les usurpations et l'arbitraire.*<sup>34</sup>

#### IV. DEFINITION OF THE RIGHT OF ANGARY.

Having considered how the modern right of angary came into international law by Napoleon's action in 1798, it may now be defined. A great deal of confusion has existed, in the minds of many writers on international law, as to the scope and status of this right. It is somewhat related to the right of preemption and to *arrêt de prince*, but no confusion need arise in distinguishing them. Preemption is the belligerent right to requisition neutral cargoes which are contraband of war, or conditional contraband, provided a just compensation or purchase price is paid to the owners of the goods. This right is exercised on the high seas. *Arrêt de prince* is the right of a belligerent to detain neutral vessels which are in its ports in order that they may not carry news of some military event which would be valuable to the enemy. The loss caused to the owners of the detained vessels is made good by the belligerent which detains them.

There are several terms which have been used to denote the right of angary. *Prestation*, *droit d'angarie*, and occasionally, embargo of necessity, are used. The French and Anglicized terms are by far the most common, however. Some authorities distinguish between angary and *prestation*. Halleck says:

The *Jus Angarie* is a right, denoting compulsory service. . . . By virtue of this right, neutral vessels, within the territorial waters of a belligerent, may be appropriated by a belligerent, on payment of a

<sup>32</sup> *Annuaire de Droit International*, XVII, 284.

<sup>34</sup> *Droit International Public*, V, 710.

reasonable price for compensation. It is akin to the right of *prestation* by which neutral vessels may be hired by a belligerent, on payment of freight beforehand, and to embargo or *arrest of princes*.<sup>35</sup>

T. J. Lawrence holds that *prestation* is another name for angary.<sup>36</sup> Dana takes the same position:

But the embargo has been employed for a still different purpose; that is, to gain possession of neutral vessels found in port on the breaking out of war, to be used for transportation of munitions or troops, or for other temporary belligerent purposes. It is difficult to distinguish this from seizure of innocent neutral vessels, at any later period of the war, for the use of the belligerent government. This act is called *Angaria*, or *le droit d'Angarie*, or *Prestation*.<sup>37</sup>

Wilson and Tucker treat angary and *prestation* as synonymous: "In some cases, belligerents exercise the so-called right of using or destroying neutral property on the plea of necessity, giving compensation. This practice is called 'angary,' or 'prestation.' . . ."<sup>38</sup>

Hall: "The right to use, or even when necessary to destroy such property (property passingly within a belligerent state) is however recognized by writers under the name of the right of angary."<sup>39</sup>

Kleen distinguishes the two terms:

*Et elle (angary) differe de la prestation—même lorsque celle-ci s'effectue par la propriété des violentes—en ce que l'emploi s'en fait dans les mains de l'usurpateur et non dans celles des propriétaires.*<sup>40</sup>

Ferguson seems to attempt a distinction but does not maintain it:

Neutral vessels may be hired for employment in the service of the State, by paying freight beforehand, for the transport of soldiers, ammunition and instruments of war. This is what is understood by the belligerent right of *prestation*.

But in defining angary, he gives the terms as synonymous:

Neutral vessels may be appropriated and taken over by the belligerent State, on payment of a reasonable price, with compensation

<sup>35</sup> International Law, I, 519.

<sup>36</sup> *Ibid.*, 515.

<sup>37</sup> *Ibid.* (Wheaton ed.), p. 313.

<sup>38</sup> *Ibid.*, 320.

<sup>39</sup> Treatise on International Law, 812.

<sup>40</sup> *Lois et Usages de la Neutralité*, II, p. 68.

for loss and expenses to be paid by the appropriating State. This belligerent right is called Admiralty right or prestation (*droit d'angarie*).

By the use of the French expression in parenthesis immediately after the word prestation, it appears as a synonymous term.<sup>41</sup>

It thus appears that the only ground for a distinction as made by the very few authorities who attempt a distinction at all, is that the vessels are hired by the belligerent and freight paid in advance in case of prestation, while in case of angary they are appropriated or destroyed, compensation or indemnity being made later. While it is true that the Latin *præstationis* means a guaranty or security, and for that reason is well applied to cases where indemnity is paid in advance, it is not useful to carry a distinction, since part of the treaties provide for payment in advance and part do not so provide. In no instance during the present war has the exercise of the right of angary been accompanied by compensation in advance; the states exercising the right, both belligerent and neutral, agreed to pay compensation, but the amount was in each case to be fixed when the requisitioning government saw fit and when the need for the vessels had passed.

In view of the application of the right of angary to a neutral's urgent necessities as well as a belligerent's needs, the definition of the right must be revised to include the neutral. Hitherto the belligerent only has been considered competent to exercise the right. Its extension to neutrals by The Hague Convention V, Article 19, as regards railway material, and its use by Portugal in 1916, requires a revamping of the old definition, which may now be stated as follows: The right of angary is the right of a State, in time of war or public danger, to requisition for its own use, or even destroy, vessels of other Powers lying within its jurisdiction. It may be exercised only in case of urgent public necessity, and the owners of the vessels must be fully compensated for the use of their ships; reasonable provision for the crews must be made.

<sup>41</sup> Manual of International Law, II, 438-440.

## V. WHENCE FLOWS THE RIGHT OF ANGARY?

Is the exercise of the right of angary a use of belligerent power, an exercise of a sovereign right or prerogative, or an application of the principle of eminent domain or territorial power?

There would seem to be no question that the old right at the time of Justinian was a right of sovereignty. The passage of the Code already quoted shows that the burden of angary fell upon all classes alike. Stypmann wrote that "*hoc ius angariarum*" is "*inter alia iura, quæ imperator Justinianus ait.*"<sup>42</sup> Loccennius held that "*has angarias imponere possunt navibus ille principes et respublicæ, quæ iura maiestatis habent.*"<sup>43</sup> Azuni regarded angary as a prerogative of the supreme power (*puissance suprême*).<sup>44</sup> Hautefeuille (1858) takes issue with those publicists who held angary to be a sovereign right, and maintains that it is a territorial power (*puissance territoriale*).<sup>45</sup> Referring to treaties, he says that

*aucun ne contient un seul mot qui puisse faire penser que l'angarie fut regardée comme un droit regalien. Cette remarque est importante; elle s'applique à tous les traités qui se sont occupés de cette question, et répond à quelque publicistes, qui ont cru devoir donner ce titre au prétendu droit d'angarie.*

Ferguson believes that angary is exercisable under the right of eminent domain.<sup>46</sup> Calvo thinks it is a "*prerogative de la souveraineté.*"<sup>47</sup>

Up to the time of the Second Hague Peace Conference, in 1907, the idea that a neutral as well as a belligerent might exercise the right of angary had not been put forward. The way in which it was suggested was by the seizure of some Swiss rolling stock by the Germans in 1870. The hardship worked upon the Swiss at that time inspired

<sup>42</sup> *Ius Maritimum*, p. 608.

<sup>43</sup> *Iure Maritimo et Navali*, p. 927 (Heinnecius ed.).

<sup>44</sup> *Droit maritime de l'Europe* (1797), p. 78.

<sup>45</sup> *Histoire des origines*, etc., p. 258.

<sup>46</sup> *Manual of International Law*, p. 438.

<sup>47</sup> *Le droit international*, III, Art. 1277.



the delegates at the 1907 Peace Conference to adopt as Article 19 of Convention V, the following provision:

Railway material coming from the territory of neutral Powers, whether it be the property of the said Powers or of companies or private persons, and recognizable as such, shall not be requisitioned or utilized by a belligerent except where and to the extent that it is absolutely necessary. It shall be sent back as soon as possible to the country of origin.

A neutral Power may likewise, in case of necessity, retain and utilize to an equal extent material coming from the territory of the belligerent Power.

Compensation shall be paid by one party or the other in proportion to the material used, and to the period of usage.

Here we see the neutral given the same right as the belligerent. During the present war, this provision has been taken advantage of by the Republic of Portugal, but the principle stated in the article was applied to German vessels in Portuguese ports and not to railway material. The ground given by the Government of Portugal for the seizure of the vessels was that they were "*comme une autre propriété se trouvant dans le pays, à la souveraineté territoriale illimitée et, par suite, à la mainmise complète du Portugal.*"<sup>48</sup>

As a consequence of this precedent, a new light is thrown upon the whole subject of the right of angary, for we can no longer limit the privilege of exercising the right to the belligerent alone. In the first place, the neutral has no reason of military necessity to assign to its action, unless of course, indirect hardships caused by belligerent action be called a military necessity as regards the neutral. Again, the Portuguese action strengthens the idea that the right of angary must henceforth be regarded as a right of territorial or jurisdictional sovereignty and not as a prerogative of sovereignty. That is to say, the mere circumstance of the vessels being in a given port when the right is exercised, must be stressed much more than formerly. To be sure, it is an exercise of sovereign power, but since its exercise is dependent upon, and limited to, territorial ports over which the exercising power has jurisdiction, it would be entirely proper to say that a

<sup>48</sup> Basdevant, "*La Requisition des navires allemands,*" *Revue de droit international public*, XXIII, 270: taken from German declaration of war against Portugal.

use of territorial sovereignty is made and not merely a use of a prerogative of sovereignty. This distinction is in harmony with that made by Hautefeuille and Ferguson, the latter holding that the principle of eminent domain was applied in the exercise of the right of angary; it places the neutral and belligerent on common ground; it divorces the right from a certain connection which has hitherto been attached to it, *viz.*, that it has been only an exercise of belligerent power, and that usually in violation of some Power's neutrality. The Portuguese people needed food and supplies; there was a public necessity to be met by requisitioning German vessels.

Since the conference of 1907 at The Hague, there has been a tendency to regard the right as one of territorial sovereignty or eminent domain rather than as a prerogative of sovereignty. The fact that it has been exercised by a neutral, and that it has been applied to railway material as well as ships, indicates that in addition to military expeditions, the occasions on which the right may be exercised are likely to be more numerous hereafter. That is to say, the widening of the scope of the right and the Powers which may exercise it, increases the occasions upon which it will be exercised.

From a legal viewpoint, see the note of Mr. Balfour, the British Foreign Minister, to Mr. van Swinderen, the Dutch Foreign Minister, April 25, 1918, *infra*, p. 291.

#### VI. JUDICIAL DECISIONS RELATING TO ANGARY

One of the cases which furnishes confirmatory evidence of the use of neutral vessels by Napoleon is the case of the *Carolina*, decided in the British High Court of Admiralty, April 30, 1802. This was a Swedish vessel which had been used by Napoleon to transport troops to Egypt. When the port of Alexandria was invested by the British fleet, opportunity was given to neutral vessels to depart, but the *Carolina* was not permitted to leave by order of the French commander. Bills on the French Government and letters from the French commander were found on board the vessel, which showed clearly that it had been used as a transport.<sup>49</sup> The owner of the vessel brought his claim for damages against the British Government, but Sir William

<sup>49</sup> Robinson's Admiralty Reports, IV, 256-62.

Scott decided in no uncertain language that he must resort to the French Government for such a claim.

Another very enlightening case was considered by Professor P. B. Boucher, of the Department of Commercial and Maritime Law of the French Academy of Legislation, in 1803. The Russian captain, Theocaris di Jiovani, was at the port of Ancône in 1801, with his vessel. He was forced by the French general, Salignac, to agree to transport some French cannon, ammunition, and military supplies to Tarente and to break a contract which he had already made. The conditions were, says Professor Boucher, "*qu'il lui seroit payé, par ces entrepreneurs, 700 piastres d'Espagne; avant son départ, et à la décharge de son navire à Tarente, 350 autres piastres, ce qui portoit le fret à 1,050 piastres non compris la cape ou chapeau du capitaine, qui devoit être de 50 piastres. . .*"<sup>50</sup>

Professor Boucher and his associate juriconsults reached the following conclusion:

*Le droit d'arrêter un vaisseau, avant 1753, prenoit la source dans cette prerogative de la puissance suprême, appelée angarie; dans ce cas, le capitaine avoit le droit de se pourvoir en indemnité. . .*

*Cet arrêt, appelé par les publicistes arrêt de prince, fut reconnu si prejudiciable, que dans tous les traités qui ont été faits entre les puissances, subséquemment au traité de 1753 conclu entre le roi de Naples et la Hollande, qui a servi de modèle,<sup>51</sup> les Souverains sont convenus que les navires, les équipages et les marchandises, chargés, ne pourroient plus être arrêtés en vertu d'aucun ordre général ou particulier pour quelque motif que ce fût.*

Then after showing that the treaty of 1787 between France and Russia, which prohibited angary, was not abrogated by the establishment of the French Republic, the decision is concluded as follows:

*. . . et que si le General français a contraint le capitaine russe . . . de contracter avec l'entrepreneur . . . c'est que des circonstances impérieuses l'ont forcé à tenir lui-même cette conduite. Mais il n'est pas moins vrai, que si lors du temps que l'angarie et l'arrêt de prince étoient reconnus, par tous les Gouvernements, pour légitime, le Gouvernement qui arrêtoit un vaisseau, devoit de justes indemnités*

<sup>50</sup> Boucher, P. B., *Institution au droit maritime*, p. 396 fol.

<sup>51</sup> This treaty was not the model, as there were at least four treaties of like tenor already in force.

*au capitaine: que sera-ce lorsqu'un Gouvernement fera un arrêt dans le temps qu'il est formellement reconnu pour illégitime, ou tout au moins préjudiciable? Dans cette circonstance, il est clair qu'il doit rigoureusement des indemnités au capitaine qui a été arrêté pour son service. . . . Il résulte de ces détails, que la réclamation du capitaine paroît fondée. . . .*

A case arising out of the present war and involving the question of the right of angary was decided in the British Admiralty Court, 1916, by the Judicial Committee of the Privy Council. Concerning the legal aspects of the case, Lord Parker in rendering the judgment said:

The fact, however, that the Crown possesses such a right (to requisition property of British subjects) in this country and that somewhat similar rights are claimed by most civilized nations, may well give rise to the expectation that, at any rate in time of war, some right on the part of a belligerent Power to requisition the goods of neutrals within its jurisdiction will be found to be recognized by international usage. Such usage might be expected either to sanction the right of each country to apply in this respect its own municipal law, or to recognize a similar right of international obligation. . . .

The right of a belligerent to requisition the goods of neutrals found within its territory, or territory of which it is in military occupation, is recognized by a number of writers on international law. It is sometimes referred to as the right of angary, and is generally recognized as involving the obligation to make full compensation. There is, however, much difference of opinion as to the precise circumstances under which it may be lawfully exercised.<sup>52</sup>

<sup>52</sup> Admiralty Court (1916) pp. 99-106.

EDITOR'S NOTE: It seems of interest to add the following extract from the opinion of Lord Parker of Waddington in the above case:

"The power in question was asserted by the United States of America in the Civil War which broke out in 1861. In the *Memphis* ([1862] Blatchford P. C. 202) in the *Ella Warley* ([1862] Blatchford P. C. 204) and in the *Stephen Hart* ([1862] Blatchford P. C. 379, 387) Betts, J., allowed the War Department to requisition goods in the custody of the prize court and required for purposes in connection with the prosecution of the war. In the case of the *Peterhoff* ([1862] Blatchford P. C. 381) he allowed the vessel itself to be similarly requisitioned by the Navy Department. The reasons of Betts, J., as reported are not very satisfactory, for they leave it in doubt whether he considered the right he was enforcing to be a right overriding the international law or to be a right according to the international law. But his decisions were not appealed nor does it appear that they led to any diplomatic protest.

On March 3, 1863, after the decision above referred to, the United States

## VII. CASES OF THE EXERCISE OF THE RIGHT OF ANGARY

During the spring of 1798 Napoleon sent orders to his commanders at the ports of Ancône, Toulon, Marseille, Civita Vecchia, Genoa, and others, directing them to take "*les plus gros bâtiments possible*" and "*s'il est nécessaire, des bâtiments neutres.*"<sup>53</sup> On September 13, 1798, he sent the following order to his *Quartier general* at Cairo:

*Article 1er.*—*Tous les bâtiments composant le convoi de Toulon, Marseille, Corse, Gênes, Civita-Vecchia, qui ont été affrétés pour le transport de l'armée ou de l'artillerie, sont licenciés.*

*Art. 2.*—*Il sera accordé pour chaque bâtiment, au moment où il sera dans le cas de partir d'Alexandria, 50 livres de riz, 25 livres de légumes par homme d'équipage, et 40 livres pour pouvoir à leurs besoins pendant la traversée.*

*Art. 3.*—*Leur compte d'affrètement sera arrêté par l'ordonnateur de la marine d'Alexandria jusqu'au 15 Vendémiaire, an VII, qui, déduction faite des avances qu'ils ont reçues et de la valeur des vivres qu'on leur fournit, tirera, pour le restant, des traites sur l'ordonnateur de la marine à Toulon, ou sur le ministre de la marine.*

Legislature passed an act (Congress, Sess. III, c. 86 of 1863) whereby it was enacted (s. 2) that the Secretary of the Navy or the Secretary of War should be, and they or either of them were thereby, authorized to take any captured vessel, any arms or munitions of war or other material for the use of the government, and when the same should have been taken before being sent in for adjudication or afterward, the Department for whose use it had been taken should deposit the value of the same in the Treasury of the United States, subject to the order of the court in which prize proceedings might be taken, or if no proceedings in prize should be taken, to be credited to the Navy Department and dealt with according to law."

His Lordship adds

"It is impossible to suppose that the United States Legislature in passing this act intended to alter or modify the principles of international law in its own interest or against the interest of neutrals. On the contrary, the act must be regarded as embodying the considered opinion of the United States authorities as to the right possessed by a belligerent to requisition vessels or goods seized as prize before adjudication."

Their Lordships, however, were of the opinion that this act went beyond what was justified by international usage, and the protest of the British Government and the opinion of the Attorney-General of the United States are cited in support of such criticism.

C. N. G.

<sup>53</sup> *Correspondence de Napoleon, IV* (Plon edition).

*Art. 4.—Les bâtimens suédois, danois, grecs, impériaux, ottomans, ragusins, napolitans et toscans, pourront partir quand ils jugeront à propos; on fournira, autant qu'il sera possible, le chargement qu'ils pourront à faire leur retour.*<sup>54</sup>

These vessels were chartered or freighted (*noliser, affreter*); an allowance of rice and vegetables was given for each man of the crews which was sufficient to provide for them until they reached their home ports; the chartering account was to run until 15 Vendemaire, an VII (September, 1799), which shows that Napoleon allowed about a year's extension of the time for which the vessels were allowed compensation. Presumably this extra allowance was made for the interruption of the commerce in which the vessels had been engaged, and, of course, it would take them some time to reach home and re-engage in trade.

One of the most commonly cited instances of the use of the right of angary is the episode of 1870. The facts can not be better set forth than by the correspondence of the interested parties.

*Count Bismarck to Count Bernstorff. (Communicated to Earl Granville, February 1, 1871.)*

I do myself the honour of transmitting to your Excellency, in pursuance of my preliminary communication of the 4th, and my telegram of the 8th instant, a copy of the Report from the 1st Army Corps on the sinking of English ships in the Seine, near Duclair, the preparation of which has been delayed by the manifold movements of the Corps concerned. Your Excellency will find therein, with the same satisfaction as myself, that the measure in question, however exceptional in its nature, did not overstep the bounds of international war-like usage. The Report shows that a pressing danger was at hand, and every other means of averting it was wanting; the case was, therefore, one of necessity which, even in time of peace, may render the employment of destruction of foreign property admissible, under reservation of indemnification. I take the opportunity of calling to mind that a similar right in time of war has become a peculiar institute of law, the *Jus angariæ*, which Sir Robert Phillimore defines thus: . . .<sup>55</sup>

He then gives Phillimore's view, and continues:

I hope the negotiation with the owners, for which you are already authorized, will lead to an understanding as to the indemnification for

<sup>54</sup> *Correspondence de Napoleon*, IV, p. 492.

<sup>55</sup> British State Papers, 1870, 1871, p. 575 fol.

the damage; if not, it will have to be submitted to an arbitrator's award.

The British Government did not strenuously object to the sinking of the vessels after the assurance of full indemnity was given. On April 24, 1871, Earl Granville wrote to Count Bernstorff "that the Board of Trade has now concluded a patient and exhaustive investigation of the claims preferred on account of the sinking . . . of 7 British colliers in the vicinity of Rouen, and has arrived at the conclusion that the sum at which these claims can fairly and reasonably be assessed is £7,088 8s. 5d." The Prussian Government paid this amount, diminished by a small amount for some boats belonging to the colliers which were not destroyed but were sold by the owners. (The question of indemnity is considered in Part VIII, *infra*.)

By far the most important use of the right of angary yet made occurred in the present war. In August, 1914, the British Government took over two Turkish vessels which were building in British shipyards. Italy, while still neutral in 1915, took over the German vessels in her ports, and Portugal followed the example of Italy in 1916 by taking over all German vessels in Portuguese waters. In March, 1918, the Associated Governments, particularly the United States and Great Britain, requisitioned about 1,000,000 tons of Dutch shipping within their respective ports. On August 31, 1918, Spain seized all the German vessels lying in Spanish waters. About 90 vessels were affected.

The conditions on which the Associated Governments requisitioned the Dutch vessels are stated by the British Foreign Secretary, Mr. Balfour, in a note to Sir W. Townley, British Minister at The Hague, March 21, 1918:

After full consideration, the Associated Governments have decided to requisition the services of Dutch ships in their ports in exercise of the right of angary: . . .

The Associated Governments hope that it may be possible to arrive at an agreement with the owners as to rate of payment, values for insurance, &c., and on these points a further communication will be sent shortly. At the end of the war the ships will be returned to their owners, who will, of course, be compensated for any losses caused among the ships by enemy action. The Associated Governments are

willing, further, to offer the owners, on conditions to be mutually agreed upon, an option to have any ships which may be lost in the danger zone as it exists at present actually replaced by another ship within the shortest possible period after the conclusion of peace. . . .<sup>56</sup>

In reply to Mr. Balfour's note, the Dutch Minister for Foreign Affairs wrote on March 31st:

In your note of 22nd March your Excellency was good enough to inform me that the Associated Governments, in virtue of the so-called "right of angary," have decided to requisition the services of Dutch vessels lying in their ports. . . . In the first place, I must remark that the Queen's Government, as your Excellency knows, in no way agree to the interpretation now given to the right of angary, an ancient rule unearthed for the occasion and adapted to entirely new conditions in order to excuse seizure *en masse* by a belligerent of the merchant fleet of a neutral country. . . . The so-called right of angary is the right of a belligerent to appropriate as an exception a neutral ship for a strategical end of immediate necessity. . . . Application of this right to a fleet *en masse* is an interpretation entirely arbitrary and incidental (*d'occasion*). . . . The Netherlands Government reserve all their rights to complete repair for injury resulting from this act. . . ."

On April 25, 1918, Mr. Balfour replied:

It is now necessary to deal with the legal contentions of M. Lou-don's note, in view of the violent statements which have been made in the Netherlands, and some of the arguments which have been used in the note under discussion. It is true that the British note of 21st March bases the requisitioning of these ships on the right of angary, but it appears to make little difference whether the act of requisitioning is treated as founded on that right or upon the general right of sovereignty over all persons and property within the jurisdiction.

It would appear that the Netherlands Government consider the right of angary to be an ancient rule, which has fallen into desuetude until unearthed by His Majesty's Government as justifying an arbitrary act on their part. The right is certainly an ancient one, and its existence has been recognized, though admittedly in some cases with reluctance, by nearly all writers on international law, from Grotius downwards.

After citing several authorities who recognize the right, Mr. Balfour mentions the 1870 incident, the recognition of the right in the

<sup>56</sup> British State Papers, Miscellaneous (1918), No. II.



U. S. Naval War Code of 1900, the *Zamora* decision of 1916, and several treaties recognizing the right, continuing:

In view of the above considerations, the Netherlands Government can hardly maintain that the right which the Associated Governments have exercised is an obsolete one. . . .

His Majesty's Government readily admit that in one respect the right may have been modified in modern times. According to the old practice it was permissible not only to requisition neutral shipping, but to compel the masters and crews, even against their will, to work the ships during their employment in actual military operations. . . .

The Netherlands Government allege that the measure taken only rests on force. His Majesty's Government would suggest on the other hand that it is, on the present occasion at any rate to the extent to which it has been employed, an exercise of the right of sovereignty. . .

It is a commonplace that the rights of a sovereign State extend over all property within its jurisdiction, irrespective of ownership, and neutral property within belligerent jurisdiction is, in the absence of special treaty stipulation, as liable to requisition in case of emergency as the property of subjects. . . . The fact that the exercise of this right has received a particular name should not obscure the truth that it is a legal exercise of the right of a sovereign State, and not an act by a belligerent based on no principle of law, and for which the only justification is to be found in usage.

It might be noted here that on June 11, 1917, the question of the right of Great Britain to take over vessels flying the Dutch flag but which were for the most part financed by British ship-owners, was raised. In a communication to Sir W. Townley, M. Loudon, the Dutch Foreign Minister, said: "The sole case where requisitioning by a belligerent might be admissible is that of absolute military necessity. International law knows no other. . . ." On June 18, 1917, Mr. Balfour wrote the following reply to the Dutch Government:

. . . The right of a belligerent to requisition neutral property, and especially neutral ships, in certain circumstances is admitted by M. Loudon, and is of course so well established that it can not be contested. M. Loudon appears to doubt, however, whether the circumstances of the present case are such as to justify the exercise of this right. I can not believe that such a contention could be substantiated. The fact that the continuous supply of sea-borne materials which are essential to the conduct of the war is vital in the military interests of this country will hardly be disputed, and if confirmation of it be needed, it is only necessary to look at the repeated statements of the

German authorities—which indicate that their only hope of success now rests not on the efforts of their military forces on land, but on the cutting of the overseas communications of this country by the illegal and inhumane actions of submarines. If the right to requisition neutral shipping is not to be used in such circumstances, it is not easy to imagine conditions in which it would be held to apply. . . .<sup>57</sup>

Although the Government of the United States did not go into the legal phase of the question of angary as did the British Government, speaking in the name of the associated powers, such discussion as appeared is much in point.

In a proclamation issued at the time of the requisitioning of the Dutch vessels in ports of the United States, President Wilson stated that “the law and practice of nations accords to a belligerent Power the right in times of military exigency and for purposes essential to the prosecution of war, to take over and utilize neutral vessels lying within its jurisdiction.” He further stated, on March 20, 1918, that

Ample compensation will be paid to the Dutch owners of the ships which will be put into our service and suitable provision will be made to meet the possibility of ships being lost through enemy action. It is our earnest desire to safeguard to the fullest extent the interest of Holland and of her nationals. By exercising in this crisis our admitted right to control all property within our territory we do no wrong to Holland. The manner in which we proposed to exercise this right and our proposals made to Holland concurrently therewith, can not, I believe, fail to evidence to Holland the sincerity of our friendship toward her.<sup>58</sup>

On March 25th, the American Legation at The Hague made public the following statement:

It appears that fear exists that requisitioned Dutch ships will be lost permanently to their owners and the Dutch flag.

The legation is advised officially that the United States has not taken title to any such ships under the present proclamation, but merely taken them over for temporary use.

Liberal chartering rates will be paid and the ships returned at termination of the present emergency, and not later than the end of the war.

The United States will assume all marine risks, and in the event of loss by enemy action in the war zone, as defined on March 1, 1918,

<sup>57</sup> British State Papers, Miscellaneous (1918), No. 5.

<sup>58</sup> New York Times Current History Magazine, May, 1918, pp. 303-304.

the owners will be given the option of receiving payment of the value of the vessel or having the vessel replaced as soon as possible after termination of the war, meanwhile receiving interest on the value of the lost vessel.

Dutch crews and officers will be maintained at the expense of the United States until a suitable opportunity for repatriation occurs.<sup>59</sup>

While the Italian decree of November 11, 1915, was worded to apply to foreign merchant and pleasure vessels, it applied particularly to German vessels then lying in Italian ports. Italy had declared war on Austria-Hungary in May, 1915, but technically, was not at war with Germany at the time of issuing the decree of November. This decree provides:

*Art. 1.—Les règles établis par le décret du lieutenant général du 17 juin, 1915, No. 957, sont étendues à la réquisition des navires marchands et de plaisance de pavillon étrangère et aux bateaux et chalands de propriété étrangère, présents dans les ports et dans les eaux territoriales du Royaume et des colonies, sous réserve des dispositions des articles suivants.*

*Art. 2.—Le paiement de la compensation de réquisition (à calculer en conformité de l'article 5 du susdit décret) sera exécuté par paiements mensuels, le mois échu, aux ayants droit et à leurs représentants légaux.<sup>60</sup>*

The decree of June 17, 1915, referred to in Article 2 of the above decree, provides:

*Art. 4.—Une Commission spéciale formée par le ministre de la marine, présidée par le directeur général de la marine marchande, et composée d'un officier supérieur de la marine, d'un officier supérieur de l'administration centrale de la marine marchande, et d'un capitaine de port, établira les conditions sous lesquelles l'usage des navires dont il est parlé à l'article 3 sera concédé aux dites administrations, corporations, ou sociétés qui peuvent s'en servir ou peuvent être dûment autorisées à sen servir.*

*Art. 5.—Le paiement d'une taxe mensuelle pour le privilège correspondant à l'intérêt commercial sur la valeur réelle du navire à l'époque de sa réquisition devra être inséré parmi les conditions attachées à l'affrètement des navires en question (enemy merchant vessels). Le coût des réparations plus ou moins importantes qu'il peut*

<sup>59</sup> New York Tribune, March 26, 1918.

<sup>60</sup> Gazzetta Ufficiale, quoted by Revue de Droit International Public, XXIV, p. 166.

*être nécessaire de faire au navire pour le rendre capable d'aller en mer sera déduit de la taxe mensuelle dont parle le paragraphe précédent.—D'un autre côté, les frais de conservation et toutes autres dépenses imposées par la course du navire seront payes par les administrations, corporations ou sociétés qui l'ont utilisé.*

*Art. 6.—Les taxes mensuelles à payer pour le privilège indiquées dans l'article précédent, et diminuées des déductions prévues dans le même article, seront versées à une caisse spéciale et séparée au crédit des parties désignées à cet effet, . . . A la fin des hostilités, la caisse devra être liquidée en faveur des personnes désignées, conformément avec nos dispositions qui suivent.<sup>61</sup>*

It should be noted that the conditions laid down in this decree for compensation to owners of enemy merchant vessels were extended by the November decree to foreign vessels. The provision for monthly payments to the affected owners of the requisitioned vessels is new. Such provision is not found in any of the treaties, nor did the United States or Great Britain allow monthly payment to the Dutch ship owners. The method of fixing the amount of compensation is unilateral, as the commission consists only of Italians. The same method was adopted by Portugal, but she did not arrange monthly payments, but will give compensation at the end of the war.

On February 23, 1916, the Government of Portugal requisitioned all German vessels found in Portuguese territorial waters, both continental and colonial. The German Minister at Lisbon immediately entered a protest against the taking over of the vessels without previous arrangement with the owners as to indemnity. The treaty of November 30, 1908, between Germany and Portugal provides in Article 2 that

*Leurs (subjects of contracting powers) propriétés ne pourront être séquestrées, ni leurs navires, . . . être retenus pour un usage public quelconque, sans qu'il leur soit accordé préalablement un dédommagement à concerter entre les parties intéressés sur des bases justes et équitables . . .<sup>62</sup>*

The Portuguese Government did not observe that part of the clause providing for the fixing of indemnity in concert with the interested parties. The decree of February 23d provided for the fixing

<sup>61</sup> *Revue de Droit International Public*, XXIII, p. 192.

<sup>62</sup> *Basdevant, Revue de Droit Int. Public*, XXIII, p. 271.

of the indemnity by a Portuguese commission. On February 27th, Dr. Rosen, German Minister at Lisbon, protested as follows: .

*Je suis chargé par mon gouvernement de protester contre la singulière violation du droit que le gouvernement portugais a commise contre l'Empire allemand en s'emparant, par un acte de violence, sans aucune négociation préalable, des navires allemands se trouvant dans les ports portugais. J'ai l'honneur, en même temps . . . de solliciter . . . la révocation immédiate de cette mesure.*

In reply to this brief protest, the Portuguese Government held that it had the same right of "domaine eminent" over German vessels immobilized in its ports as it had over other property within its jurisdiction; that it had only provided for urgent needs of its maritime commerce and the German Government had entered no protest when Italy had seized German vessels lying in her ports; that the measures taken were legal and the German owners would be indemnified.<sup>63</sup>

The German reply is given by Professor Basdevant as follows:

*Le 23 février eut lieu, en vertu d'un décret du même jours et sans négociation préalable, la saisie des navires allemands. Ceux-ci furent occupés militairement et les équipages débarqués. Le gouvernement impérial a protesté contre cette violation flagrante du droit et demandé la levée de la saisie des navires.—Le gouvernement portugais a rejeté la demande et cherché à fonder son acte de violence sur des considérations juridiques. Il déduit de celles-ci que nos navires immobilisés par la guerre dans les ports portugais, en vertu de cette immobilisation, n'étaient pas soumis à l'article 2 du traité germano-portugais de commerce et de navigation, mais, comme une autre propriété se trouvant dans le pays, à la souveraineté territoriale illimitée et, par suite, à la mainmise complète du Portugal. En outre, il pense s'être tenu à deçà des limites de cet article puisque la réquisition des navires correspondait à un besoin économique urgent et qu'une indemnité à fixer ultérieurement était prévue dans le décret de saisie. Ces considérations apparaissent comme de vains subterfuges. L'article 2 vise toute réquisition de propriété allemande se trouvant en territoire portugais, de sorte qu'on peut ne pas se demander si l'immobilisation invoquée des navires allemands dans les ports portugais a modifié leur condition juridique. Le gouvernement portugais a violé ledit article à deux points de vue. D'une part, dans la réquisition, il ne s'en est pas tenu aux limites conventionnelles puisque l'article 2 suppose qu'il s'agit de satisfaire à un besoin de l'Etat, tandis*

<sup>63</sup> Basdevant, *Revue de Droit Int. Public*, XXIII, p. 270.

que la saisie a porté ouvertement sur beaucoup plus des navires allemands qu'il n'était nécessaire pour satisfaire aux besoins du Portugal en navires. De plus, l'article fait dépendre la saisie des navires d'un accord préalable avec les intéressés au sujet de l'indemnité à accorder, tandis que le gouvernement portugais n'a pas tenté une seule fois de s'entendre avec les Compagnies allemandes directement ou par l'intermédiaire du gouvernement allemand. Toute la procédure du gouvernement portugais se présente ainsi comme une grave violation du droit et du traité. . . .<sup>64</sup>

As pointed out by this German note, the Portuguese Government violated the terms of the 1908 treaty as regards the fixing of indemnity in advance and in accord with those interested. Professor Basdevant attempts to evade this breach of the treaty by explaining that the German vessels were not in transit (*in transitu*) as contemplated by the treaty, but that they were immobilized in Portuguese ports. He says:

*Le point de vue juridique du gouvernement portugais est le suivant: le traité de 1908 ne règle la réquisition des navires que lorsqu'ils sont in transitu, ce qui est, d'ailleurs, leur situation normale: en vue de celle-ci et pour garantir le libre parcours, des garanties spéciales sont stipulées consistant dans la nécessité d'une indemnité préalable et fixée d'accord. Les navires allemands, immobilisés depuis dix-huit mois, ne sont plus in transitu: ils ne sont plus que des propriétés étrangères dans le cadre territorial de l'Etat portugais. La réquisition qui s'y applique est soumise non au traité de 1908, mais au droit international coutumier selon lequel l'indemnité n'est pas nécessairement fixée par un accord avec les parties intéressées elle peut l'être par acte unilatéral des organes de l'Etat agissant sous la responsabilité de celui-ci.*<sup>65</sup>

While there can be no question that Portugal was within her rights in requisitioning the vessels, it is difficult to explain away the fact that the treaty expressly provides that an indemnity, just and equitable, must be fixed in advance, in accord with the interested parties.

Pchedeck believes that if a neutral is given the privilege of exercising the right of angary, a serious conflict will arise, because the rule that a neutral may not purchase belligerent ships might then be contravened. Instead of purchasing belligerent vessels, the neutral

<sup>64</sup> Basdevant, *Revue de Droit Int. Public*, XXIII, pp. 270-71.

<sup>65</sup> *Ibid.*, p. 274.

could requisition them. Speaking of the Portuguese seizure of the German vessels, he says:

*D'ailleurs, ceux qui cherchaient par tous les moyens à faire reconnaître la parfaite conformité du décret portugais du 23 février 1916 avec les règles du droit des gens ne se sont pas aperçus qu'ils entraient ainsi en contradiction avec eux-mêmes. En effet, d'un côté ils reconnaissent le droit pour le neutre de réquisitionner les navires marchands belligérants, de l'autre côté, ils n'admettent pas la faculté réclamée par certains neutres, d'acheter ces navires. Comme nous verrons plus loin, cette dernière opération est considérée comme illicite par la pratique internationale: il faut alors pour rester dans la logique condamner également la réquisition, car elle pourrait servir à tourner l'interdiction d'acheter les navires d'une nation en guerre.*<sup>66</sup>

While it is true that international law does not permit a neutral to purchase vessels of belligerents, the reason for such prohibition is to prevent one of the belligerents from selling vessels to keep them from falling into the hands of the enemy. As in the case of Portugal, the neutral may exercise the right only when its own urgent needs demand it, and the question of neutrality should not enter.

On August 21, 1918, the Spanish Government issued the following statement:

As a consequence of the submarine campaign, more than 20 per cent. of our merchant marine has been sunk, more than 100 Spanish sailors have perished, a considerable number of sailors have been wounded, and numbers have been shipwrecked and abandoned. Ships needed exclusively for Spanish use have been torpedoed without the slightest pretext, serious difficulties resulting to navigation.

The government has believed that it is unable, without failing in its essential obligations and without setting aside neutrality, to defer the adoption of measures necessary to guarantee Spanish maritime traffic and to protect Spanish crews and passengers.

Consequently, the government has decided to address the Imperial German Government and declare that, owing to the reduction of tonnage to its extreme limit, it will be obliged in the case of new sinkings to substitute therefor German vessels interned in Spanish ports. This measure does not imply the confiscation of the ships under definite title. It would be only a temporary solution until the establishment of peace, when Spanish claims also will be liquidated.

Our Ambassador at Berlin has received instructions to bring this decision to the notice of the German Government. The Spanish Gov-

<sup>66</sup> *Le Droit International Maritime*, pp. 218-19.

ernment does not doubt that the German Government will appreciate the circumstances determining this resolution and will recognize that Spain, in holding to the neutrality she has practiced since the beginning of the war, has sacrificed many of her rights and legitimate conveniences when it has been possible without affecting the dignity of Spain and her national life.

The decision of the government to assure for itself sufficient tonnage, which is indispensable to its existence, does not affect its firm resolve to maintain strict neutrality.<sup>67</sup>

On August 31, 1918, the Spanish Government took over all German vessels lying in Spanish ports. About ninety vessels were affected.<sup>68</sup>

The action of the Spanish Government furnishes a clear-cut example of a neutral seizing vessels of a belligerent, and unlike Portugal, Spain remained neutral throughout the war. The Spanish note makes clear that neutrality was to be maintained, that no change of title, but temporary use was contemplated, and that the seizure is "indispensable to its existence." Nothing is said of indemnity, but it appears from the note that the Spanish Government regards the requisitioned vessels merely as substitutes for its own vessels sunk by Germany, and hence that no indemnity is to be paid.<sup>69</sup>

#### VIII. THE QUESTION OF INDEMNITY

The Associated Governments requisitioned the Dutch vessels upon the following conditions: (1) That an effort to arrive at an agreement as to rate of payment, values for insurance, etc., would be made; (2) that at the end of the war the vessels would be returned to the owners, who are to be compensated for any losses caused by enemy action; (3) that, subject to mutual agreement, the Dutch Government might have ships lost in the danger zone replaced by the Associated Governments as soon as possible after the conclusion of peace.

<sup>67</sup> *New York Times Current History Magazine*, October, 1918, p. 115.

<sup>68</sup> *Ibid.*

<sup>69</sup> EDITOR'S NOTE: The act of the Spanish Government may perhaps be better understood as in the nature of reprisal than as an exercise of the right of Angary.—C. N. G.



As to the amount of compensation which will be given, the correspondence does not furnish any light. Indeed, the fixing of this amount will be a considerable task, and many factors must enter. Will the value of vessels which have been lost be fixed for the time of requisitioning in March, 1918, or will it be for the time of fixing the compensation? Obviously, there would be a considerable difference in value for the two periods. When the very existence of Great Britain depended upon vessels and food, it is clear that a ship was worth much more to her and other nations as well than it will be when the compensation is determined.

The only precedent which furnishes a guide as to a probable method of fixing compensation is that of 1871. From Earl Granville's note of April 24, 1871, we find that the value of the seven British vessels was determined as follows: Lloyd's Association, an expert body on naval affairs, were employed by the British Board of Trade to make an appraisal of the vessels, the assumption being made that they were in good condition at the time of destruction; the Board of Trade considered the circumstances in the case similar to a forced sale and comparable to a case of collision. As was customary, something over the actual value should be allowed the owners, and the Board fixed this at 25 per cent. to be added to the estimate of the expert surveyors; on the amounts determined in the categories given above, interest at 5 per cent. was to be paid, those sums being considered as unemployed capital. Other items presented by the British Government and paid by Germany included expenses to the seamen for consular certificates, claims for loss of employment and personal effects, and the expense of transporting the crews to their homes.

Just what the "liberal chartering rates" to be paid to Holland will be, are yet undetermined. The suggestion of Bismarck in 1871, that if Prussia and Great Britain could not agree on a fair amount, it should be submitted to an arbitrator, is a sound one. The rights of two or more states are involved, and the fact that international law gives one state the privilege of exercising the right of angary, does not justify that state in proceeding unilaterally and arbitrarily to fix the compensation which it undertakes to make by the exercise

of the right. In view of the experience of the present war, it would seem to be well, for the sake of the sanctity of treaties, that treaty clauses providing that indemnity be fixed in advance might give way to clauses allowing indemnity to be fixed by a disinterested commission of experts or by arbitrators. This should be done after the emergency is passed.

J. EUGENE HARLEY.

## EDITORIAL COMMENT

### SELF-DETERMINATION

THIS is no new thing, though the phrase is new. A plebiscite to determine the consent of a population to a proposed cession of its territory and the sovereignty over it justified the reunion of Avignon and the Venaissin with France in 1791. Rivier (II, 210) mentions other cases. A portion of Savoy and Nice were ceded to France in 1860 by the Treaty of Turin, subject to this condition. "The plebiscite was also applied on a large scale by Sardinia in the creation of the modern kingdom of Italy," writes Hershey, who adds that the usage has never found favor in the eyes of either Great Britain or the United States. It was a condition subsequent in the case of North Schleswig in 1864, a condition never fulfilled, Austria speciously releasing Prussia from the obligation in 1878. The isle of Saint-Barthelèmy was ceded by Sweden to France in 1877 "sous la reserve expresse du consentement de la population de Saint-Barthelèmy." Rivier also cites the application of the principle in a treaty of 1883 between Chile and Peru. But the cession of the Virgin Islands by Denmark to the United States so recently as 1917 contains no such condition.

The plebiscite principle, then, up to the present has been infrequently applied, and no such action has been deemed necessary to the validity of a cession. What has been usual is to permit the inhabitants of ceded territory to elect whether they will transfer allegiance or not, by a declaration retaining their former citizenship if so disposed. The plebiscite principle was a fad or device of Napoleon III, yet in 1867 Thiers said of it, "The new principle of the consent of peoples is an arbitrary principle, frequently a deceptive one, and only an element of disturbance when one wishes to apply it to nations." It is not a little curious that the principle of self-determination, hitherto rarely used, never employed by the United States even so late as the cession of the Danish West Indies, looked at askance by

nearly all publicists, should suddenly at the present assume such an importance.

What has brought the principle into such prominence and made a practical question of it?

President Wilson in his Fourth of July address, last year, laid down this ideal in international affairs:

The settlement of every question, whether of territory, of sovereignty, of economic arrangement, or of political relationship, upon the basis of the free acceptance of that settlement by the people immediately concerned, and not upon the basis of the material interest or advantage of any other nation or people which may desire a different settlement for the sake of its own exterior influence or mastery.

Did this pronouncement originate the application of the self-determination principle to present conditions? I do not know, but if so, it is not being consistently used, for Trieste and the Trentino, Alsace and Lorraine, the German Colonies and the new states carved out of Austria, are apparently not to be subjected to it. Nor is the new Poland. Mr. Wilson's thirteenth point, relating to Poland, is more specific than any other of the fourteen.

An independent Polish State should be erected which should include the territories inhabited by indisputably Polish populations, which should be assured a free and secure access to the sea, and whose political and economic independence and territorial integrity should be guaranteed by international covenant.

Surely this did not mean that little enclaves of German race could be excluded from Polish allegiance. Access to the sea is essential to the commercial independence, even to the political integrity of such a state as the new Poland. Now granting that the Danzig port and corridor furnish the only satisfactory "free and secure access to the sea," such as the President speaks of, and granting that its population is overwhelmingly German, how far is the principle of self-determination to bar its cession, as against the "material interest or advantage" of Poland itself? In other words shall we put a strict or a liberal construction upon the principle. A similar problem must be faced in the case of Fiume, which is Italian in population, but claimed to be essential to the economic independence and future growth of the new state of Jugo-Slavia. There is an added complication here in war promises to Italy.

Should not the lesser right yield to the greater? The compromise

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solution of a free port seems to the writer quite inadequate, for it places the door of a state's commerce in hostile hands and limits the rights of what aspires to be a great independent nation.

The use of the plebiscite as a condition subsequent in the disposition of the coal of the Saar Valley should also be mentioned. Here, unlike North Schleswig, a time limit is said to have been set. Nevertheless, it may be questioned whether the suspended sovereignty will not give rise to more trouble than absolute cession, viewing the latter as direct and specific reparation for the wanton destruction of the Lens mines and their machinery.

Let us try to apply to the self-determination principle, both historical example and the rule of reason.

When the river traffic of our trans-Allegheny country was its only commercial outlet, New Orleans was in foreign hands. The right of free transshipment was granted by the treaty with Spain in 1795. Then came the Louisiana Purchase, a chief motive for it being the desire to possess the lower Mississippi, for the free port privilege did not satisfy the West. Now suppose the self-determination principle to have been applied to New Orleans in limitation of the Louisiana Purchase, whereby the Spanish and French population by its vote could prevent the cession of the port and lower river. Could the whole of our people consent to have its development, its dignity, its continuity, so limited? Clearly the little principle must yield to the big interest.

Or to take a different kind of parallel. Can one think complacently of an Ireland independent of Great Britain, and of an Ulster independent of Ireland.

What is the theory of self-determination founded upon? Upon the doctrine of popular sovereignty.

What is its object? To avoid subjecting a people to alien control against its will.

What size of unit answers to the description of a people? Such as is otherwise capable of independent existence.

Does the multiplication of small political units make for peace and stability? On the contrary, it makes for instability and invites aggression, since defensive power is lacking.

Has self-determination worked well in the past? In a few minor cases it may be said to have succeeded; in others it has been the cause and the result of intrigue, or has been inoperative.

My conclusion, then, from the standpoint of historical precedent and of theoretical analysis, is that the self-determination principle is comparatively new and untested; that it should be applied, if at all, with due regard to the balancing of results good and bad, rather than with relentless disregard of consequences; that there must be a limit set to the size of the unit to which it is applicable; that we would deprecate its application to ourselves.

It may be worth saying, in conclusion, that however Fiume is apportioned, apparently the old sovereign, Austria, will be shut out from the Adriatic. She, what is left of her, will therefore be forced to face northward, driven into eventual union with Germany.

THEODORE S. WOOLSEY.

#### INTERNATIONAL INTERMEDIARY INSTITUTE AT THE HAGUE

The JOURNAL has received the following announcement by the courtesy of His Excellency, J. T. Cremer, the Minister of The Netherlands to the United States. It is happy to give to it the publicity which he requests.

ACTING EDITOR IN CHIEF.

In January, 1918, a group of influential Hollanders, with various international relations, established an "International Intermediary Institute," designed to render international service of an impartial and useful nature. This institution which is purely and exclusively of a Netherland character, will make it its special business to furnish gratuitously all over the world scientific, practical and complete information on any subject of private and public international law and of international economics. The institution has its office at 3 Oude Scheveningsche weg, The Hague, opposite the Peace Palace, in which the formal opening of the Institute took place. The first year has been spent in preparatory work; a first bulletin will appear this year. The institution hopes as soon as more normal conditions prevail in Europe to satisfy a need—often so strongly felt—of a central distribution point of international intelligence. As its American correspondents the institution has appointed Mr. Ham. Vreeland, Jr., LL.B., Ph.D., Department of State, Washington, D. C.; Mr. H. A. van Coenen Torchiana, Consul General of the Netherlands, San Francisco, Cal.; and Mr. Edward R. Whittingham, A.B., LL.B., Attorney, 49 Wall Street, New York City.

CONCERNING THE RECOGNITION OF NEW GOVERNMENTS BY THE  
UNITED STATES

Before the beginning of the nineteenth century, Jefferson, as is well known, declared it to be in accord with American principles "to acknowledge any government to be rightful which is formed by the will of the nation, substantially declared." He perceived both the continuity of state life in spite of governmental changes, and also the reasonableness of entering into formal relations with whatever party ultimately gained the ascendancy. It was the fact of control rather than any other circumstance which appeared to be regarded by him as the decisive test. He announced that "the will of the nation" was "the only thing essential to be regarded," whether a "king, convention, assembly, committee, president, or anything else" might be chosen as the organ through which intercourse with foreign nations was to be had.

During the first half of the nineteenth century, and until the Civil War, the theory of Jefferson seems to have been simply applied by the United States. When a monarchical government overthrew a republican, the result was reckoned with without regard to the domestic legitimacy of the transaction, and recognition duly accorded. Irrespective of the nature or method of any change, the United States was not disposed to concern itself with more than the fact that a particular party was in actual control. Secretary Seward in 1861, and likewise his successors for some years following, pursued a different course. They announced in substance that a revolutionary government in a republican state, and defiant of an existing constitution and gaining control by sheer force of arms, ought not to be recognized by the United States until it was assured that the change was adopted by the people rather than imposed upon them against their will. Thus the will of the nation was deemed to be inseparable from or identical with that of the people. This idea found expression in American state papers for several decades, although the forms of utterance lacked uniformity. In the meantime American instructions gradually began to emphasize the significance of another consideration—the ability of any new government with respect to foreign obligations of the state.

In 1899, Secretary Hay evinced a readiness to authorize the recognition of a new government merely when it appeared "to be estab-

lished in control of the machinery of administration and in a position to fulfill its international obligations." Under such circumstances recognition was speedily accorded, and without apparent concern as to any other consideration.

In more recent years there has been a return to a position resembling that taken by Secretary Seward and followed by his immediate successors. Without failing to require assurance of the competency of a new government to perform its international obligations, importance has been attached to its respect for constitutional requirements. At the present time the United States is believed to be reluctant to recognize a new government as such, if it has attained the ascendancy by force and in defiance of a local constitution declaratory of popular rights, in the absence of convincing proof that the change is supported by the will of the people. Such a view was expressed in connection with the recognition of the government of General Estrada in Nicaragua in 1911, and in the withholding of it from that of General Huerta in Mexico in 1913 and 1914, and later from the Tinoco government in Costa Rica. Doubtless American recognition must be ultimately given where a government, however obnoxious to the people who are compelled to yield obedience, maintains itself indefinitely, and enforces locally complete submission to its will.

The United States now appears to take the stand that normally a government which by force has won apparent control in opposition to the will of the people, and with contempt for their rights assured by a local constitution, is internationally a menace, because its very supremacy sows seeds of discord bound to ripen into a conflict which, however localized, may fairly be deemed hurtful to the maintenance of the general peace. It is doubtless also believed that a government of such a character will lack those moral qualifications which are found to be essential to enable the agencies of a state to perform scrupulously its obligations to the outside world.

The soundness of these principles is now being tested by conditions in Russia where, according to the speech of Mr. Lloyd George in the House of Commons on April 16th last, "the Bolshevik government has committed crimes against the Allied subjects, and has made it impossible to recognize it even as a civilized government." It is believed to be reasonable for enlightened states to discourage the activities of arbitrary and essentially unpopular aspirants to governmental control when their methods are heedless of the laws of God or man.



In such case the according of recognition may be fairly delayed as long as possible, and moral support thus given the opposition. It may be urged that such action constitutes direct interference in the domestic affairs of a foreign state, and may be unjustly applied at the caprice of interested Powers for political ends. It should be observed, however, that there is no legal duty imposed upon a state to accord recognition at any particular time. The right to withhold it indefinitely is not wrongful. The influence exerted upon the outcome of a domestic conflict, through the exercise of the right to postpone recognition of a particular party until it becomes highly inexpedient longer to withhold it, does not resemble in kind those affirmative acts of opposition which are deemed to restrain political independence and to constitute intervention.

If in the interest of the society of nations the members thereof should habitually manifest extreme reluctance in recognizing as a new government one which acquired power in the teeth of popular opposition and by inhuman methods, evidence both of popular support and of abstinence from arbitrary procedure, would be commonly if not invariably offered by a party demanding recognition, as a necessary means of preventing indefinite delay.

CHARLES CHENEY HYDE.

#### THE NEUTRALITY BOARD

Upon the outbreak of the War of 1914, the United States, which had been pursuing the paths of peace, found itself suddenly brought face to face with the problems which inevitably confront a neutral, and as the distance of the United States from the scene of military operations made it likely that our country would be more affected by the operations of belligerents upon the ocean separating the new from the older world than by military operations upon land, a special board was created within a fortnight of the beginning of the war, known as the Joint State and Navy Neutrality Board, to handle such matters as the Department of State, on its own behalf or on behalf of other departments of the Government, might care to refer to it for examination and report. Because of the nature of the problems, it was decided to restrict the membership of the Board, so that, having the benefit of discussion and different points of view, its membership should not be so large as to prevent the rapid for-

mation of opinion. Therefore, the Board was composed of a representative from the State and of two representatives from the Navy Department. On behalf of the Department of State, Mr. James Brown Scott was appointed, and on behalf of the Navy Department Captain, now Rear-Admiral, Harry S. Knapp, and Captain, now Rear-Admiral, James H. Oliver. There was but one change in the membership of the Board during the two years and a half of its existence, due to the fact that Captain Knapp was appointed to command the *Pennsylvania*, and Captain William B. Fletcher was, on December 29, 1916, designated by the Navy Department to succeed Captain Knapp.

This is not the place, and the undersigned is not the person, to examine the opinions of the Board or to express an opinion as to their value or lack of value. An enumeration of the more important questions referred to the Board will show the nature and the extent of its labors, and the letter of the Secretary of State dissolving the Board, after the United States had ceased to be neutral, will sufficiently indicate his opinion as to the importance of its services.

Among the subjects referred to and considered by the Board were the following: Supplying of coal to belligerent warships and merchant vessels; use of the Panama Canal by belligerents; entry into and departure from neutral ports of armed merchant vessels and their treatment therein; removal of enemy subjects from American ships; belligerent use of American radio stations; the status of Government owned vessels engaged in commerce; the sale of belligerent ships during war; the status of transports and tank steamers under Government charter; the status of the Declaration of London; unneutral service by American vessels; the purchase of German merchant ships by neutrals; the conversion of merchant vessels into warships; the transit of war materials through neutral territory; the application of the twenty-four-hour rule; Orders in Council relating to blockade and contraband; the internment of belligerent warships; supplies and repairs for belligerent warships; aircraft and the laws of the air; the sale of submarines by neutral citizens to belligerent Governments; war zones; the status of belligerent merchant vessels in neutral ports; the sale of hydro-aëroplanes; the sale of munitions of war; use of neutral flags as a *ruse de guerre*; retaliatory measures adopted by belligerents; various questions relating to contraband of war; the right of angary; the torpedoing of merchant vessels; the

status of the treaty of 1828 between Prussia and the United States; German Prize Court decisions; rights of American claimants before enemy prize courts; sale of motor boats by neutrals to belligerents; enlistments in enemy armies upon American territory; censorship of mails; the right of blockade; censorship of wireless and cable messages; raising of war loans by belligerents in the United States; manufacturing of coins for belligerents; transit of enemy troops through neutral territory; visit and search; hovering of belligerent cruisers near American ports; enemy restrictions on trade; status of commercial belligerent submarines; visits of belligerent warships to neutral ports; treatment to be accorded submarine war vessels in neutral ports; enemy intrigues in neutral countries; treatment of neutrals in enemy countries; status of vessels chartered, leased or requisitioned by belligerent Governments.

The letter of the Secretary of State, dissolving the Board, to which reference has been made, follows:

In view of the declaration of the existence of war between the United States and the Imperial German Government made by Congress on April 6th last, it appears unnecessary to continue the Joint State and Navy Neutrality Board for the consideration of questions arising out of the European War while the United States was a neutral. I therefore suggest that the Board be disbanded, and that a copy of this letter be sent to each of the members thereof for his information.

Allow me to add that, in my estimation, the work of the Board as an advisory body has been of the highest order, and that, while it has not always been expedient to follow the recommendations of the Board, its well-considered opinions have been of very great assistance to the Department in formulating the policies which it has announced and pursued during the period of American neutrality. I desire, therefore, to express to the Board my deep appreciation of the splendid service rendered and the unstinted time and labor given by each member to his Government during one of the most critical periods of the history of the United States.

The opinions of the Board, in many cases elaborate and in all instances supported by authority, were advisory and, in the nature of things, considered the law rather than questions of policy. They covered a large field and will one day be interesting as showing the questions which the Government considered of more than passing importance in the days of its neutrality.

JAMES BROWN SCOTT.

MEETING OF THE EXECUTIVE COUNCIL AND POSTPONEMENT OF THE  
• ANNUAL MEETING OF THE SOCIETY

In the absence abroad of the Chairman and several members of the Committee on the Annual Meeting of the Society, the question of holding a meeting this year was considered by the Executive Committee of the Society at its meeting on March 10th, last. After careful consideration, the Executive Committee decided that, in view of the international situation then existing, it was not advisable to hold an annual meeting of the Society this year at the usual time. The President was, however, requested to call a meeting of the Executive Council instead for the transaction of such business and such other action as the Council might decide upon. President Root accordingly called a meeting of the Council in Washington on April 17, 1919. There were present: Mr. Elihu Root, Mr. Charles Noble Gregory, Dr. David Jayne Hill, Mr. Charles Cheney Hyde, Professor John H. Latané, Mr. Jackson H. Ralston, Mr. Alpheus Henry Snow, Admiral Charles H. Stockton and Professor George G. Wilson. The reports of officers and committees were received, and the Council formally approved, upon motion, the action of the Executive Committee in postponing for the present the annual meeting of the Society. All officers and committees and the Board of Editors of the JOURNAL were continued until the next meeting of the Society.

After disposing of a few items of miscellaneous business of a routine nature, the Council discussed the international situation, with especial reference to the proposed Covenant of the League of Nations from the point of view of international law. There was a general feeling of regret that the covenant had not given due recognition to international law as the rule of decision in the proposed international arrangements for settling disputes between nations and had apparently overlooked the importance of making provision for its further development and conventional application. Upon the conclusion of an interesting discussion along these lines and consideration as to what action the Council might appropriately take to give proper expression to its view, the following resolution was unanimously adopted.

*Resolved*, That the Executive Council of the American Society of International Law urges upon the Conference of Paris the adoption of a provision by

which there shall be called a general conference of the Powers to meet not less than two years or more than five years after the signing of this convention for the purpose of reviewing the condition of international law, and of agreeing upon and stating in authoritative form the principles and rules thereof; and that thereafter regular conferences for that purpose shall be called and held at stated times.

This resolution was promptly on the same day cabled to the American Peace Delegation at Paris through the Department of State.

Before it adjourned, the Council directed that the minutes of its meeting of last year, at which an interesting discussion of the international situation also took place, and the minutes of the present meeting be printed and distributed to the members of the Society. These minutes are now in course of preparation and will be published within a short time. They will be accompanied by the lists of officers, members and committees which usually appear in the annual proceedings. It is expected that the small volume containing these minutes and other material will be suitable for binding and may take the place of the usual volume of annual proceedings of the Society.

GEO. A. FINCH.

## CURRENT NOTES

### ERRORS IN THE ORDINARY VERSIONS OF THE TREATY OF BREST-LITOVSK \*

In the version of the Brest-Litovsk Treaty, as first telegraphed to this country, it was stated that Batum, Kars, and Erivan were to be given up by Russia to Turkey. Apparently the first telegrams twisted "Ardahan" into "Erdehan," from which it was easy to guess "Erivan," since the latter, having the advantage of being a government instead of a mere district or sub-division of a government, as Ardahan is, has a much more conspicuous place in the atlas. This is the version that ran through the newspapers in this country, was duly copied by many scholarly publications<sup>1</sup> and even appeared in those sponsored by the National Board for Historical Service. In fact, it is constantly coming up again to impose itself upon the unwary student or teacher.

To the uninitiated, it might seem quite unimportant as to which of these divisions was given up by Russia. To most of us in this country, these divisions were but names, without real meaning, unless our study of events in the last two Russo-Turkish wars had given us a nodding acquaintance with Batum and Kars. Scarcely one out of a million in this country had noted Erivan, or cared enough about it to investigate its importance. Three little frontier provinces of some slight value economically and strategically perhaps, but still of not sufficient importance to cause any serious consideration—why should one worry as to which three, out of the many small divisions of the Caucasus region, were lost by Russia, and, as the treaty itself carefully states, ceded to their own people for their self-determination.

The corrected version<sup>2</sup> of the treaty was perhaps a month in reach-

\* Contributed by Professor Arthur I. Andrews, of Tufts College.

<sup>1</sup> Shapiro, *Modern and Contemporary European History*, pp. 747, 748.

McKinley, *Collected Materials*, p. 98.

*Current History*, April, 1918, p. 54.

American Association for International Conciliation, *Documents*, 1918, p. 422.

*American Political Science Review*, November, 1918, p. 706.

<sup>2</sup> Brest-Litovsk Treaty, Article IV, in the *London Times* (English translation of German text) March 6, 1918, pp. 5, 6; German text in the *Reichsanzeiger*, June 11, 1918.

ing this country. By it, the three divisions were given as Ardahan, Kars, and Batum, leaving out Erivan entirely. This version seemed somewhat more reasonable, although many would wonder why Ardahan, a district of Kars province, should be separated from it in the treaty. To be sure, Ardahan has a fortress position itself, making it rank with Kars in this respect although not the equal of it, but that hardly seemed to make it necessary to particularize to this extent. The significance of this phraseology became apparent only when a reference was made back to the Treaty of Berlin, which in 1878 was supposed to settle the differences arising out of the Russo-Turkish War that had just preceded. By this treaty, the three divisions specifically named were given by Turkey to Russia, and it was only later that Ardahan was incorporated in Kars by the Russian Government.

A further significance is attached to these three names when the Cyprus Convention of 1879 is consulted. By the treaty committing Cyprus to the control of Great Britain, the Porte reserves the sovereignty of Cyprus, and the reversion of Cyprus in case Ardahan, Kars, and Batum are returned by Russia to Turkey.<sup>4</sup> The significance in the grouping of these three is revealed fully and the purpose of the Ottoman Empire in 1918 to demand Cyprus back again from Great Britain is clearly appreciated. As long as the Brest-Litovsk Treaty stood, the Turkish position would have been a very strong one whenever it found itself ready to make this demand. Russia having given up the provinces, the annexation of which had made Turkey ready to pay England's price and to give England a base which could be used in protecting the Ottoman Empire in Nearer Asia, the necessity for this concession would now lapse, and it would be easy to argue for the restoration of Cyprus to Ottoman control.

The connection of the Brest-Litovsk Treaty with the negotiations of forty years before is perhaps best brought out by the following extracts from a letter written by the Marquis of Salisbury to Mr. Layard on May 30, 1878.<sup>5</sup> After speaking of the fact that "those articles of the Treaty of San Stefano which concerned European Turkey would be sufficiently modified to bring them into harmony

<sup>3</sup> The Treaty of Berlin, Article LVIII, in Holland, *European Concert*, p. 304.

<sup>4</sup> Cyprus Convention (1878), Article I; Annex to Cyprus Convention, Article VI, in Holland, *European Concert*, pp. 354, 356.

<sup>5</sup> Orr, C. W. J. *Cyprus under British Rule*, Appendix I, pp. 184-185. Austin Henry Layard was British Ambassador to the Porte.

with the interests of the other European Powers and of England in particular,' the letter goes on to say:

There is, however, no such prospect with respect to that portion of the treaty which concerns Turkey in Asia. It is sufficiently manifest that, in respect to Batum and the fortresses north of the Araxes, the Government of Russia is not prepared to recede from the stipulations to which the Porte has been led by the events of the war to consent. Her Majesty's Government have consequently been forced to consider the effect which these agreements, if they are neither annulled nor counteracted, will have upon the future of the Asiatic provinces of the Ottoman Empire and upon the interests of England, which are closely affected by the condition of those provinces.

It is impossible that Her Majesty's Government can look upon these changes with indifference. Asiatic Turkey contains populations of many different races and creeds, possessing no capacity for self-government and no aspirations for independence, but owing their tranquillity and whatever prospect of political well-being they possess entirely to the rule of the Sultan. But the Government of the Ottoman dynasty is that of an ancient but still alien conqueror, resting more upon actual power than upon the sympathies of common nationality. . . .

Even if it be certain that Batoum and Ardahan and Kars will not become the base from which emissaries of intrigue will issue forth, to be in due time followed by invading armies, the mere retention of them by Russia will exercise a powerful influence in disintegrating the Asiatic dominion of the Porte. As a monument of feeble defense on the one side, and successful aggression on the other, they will be regarded by the Asiatic population as foreboding the course of political history in the immediate future, and will stimulate, by the combined action of hope and fear, devotion to the Power which is in the ascendant, and desertion of the Power which is thought to be falling into decay. . . .

Her Majesty's Government intimated to the Porte, on the occasion of the Conference at Constantinople, that they were not prepared to sanction misgovernment and oppression, and it will be requisite, before they can enter into any agreement for the defense of the Asiatic territories of the Porte in certain eventualities, that they should be formally assured of the intention of the Porte to introduce the necessary reforms into the government of the Christian and other subjects of the Porte in these regions. . . .

The proximity of British officers, and, if necessary, British troops, will be the best security that all the objects of this agreement shall be attained. The Island of Cyprus appears to them to be in all respects the most available for this object. Her Majesty's Government do not wish to ask the Sultan to alienate territory from his sovereignty, or to diminish the receipts which now pass into his Treasury. They will, therefore, propose that, while the administration and occupation of the island shall be assigned to Her Majesty, the territory shall still continue to be part of the Ottoman Empire, and that the excess of the revenue over the expenditure, whatever it at present may be, shall be paid over annually by the British Government to the Treasury of the Sultan.

Inasmuch as the whole of this proposal is due to the annexations which



Russia has made in Asiatic Turkey, and the consequences which it is apprehended will flow therefrom, it must be fully understood that, if the cause of the danger should cease, the precautionary agreement will cease at the same time. If the Government of Russia should at any time surrender to the Porte the territory it has acquired in Asia by the recent war, the stipulations in the proposed agreements will cease to operate, and the island will be immediately evacuated.

I request, therefore, your Excellency to propose to the Porte to agree to a Convention to the following effect, and I have to convey to you full authority to conclude the same on behalf of the Queen and of Her Majesty's Government:

"If Batoum, Ardahan, Kars or any of them shall be retained by Russia, and if any attempt shall be made at any future time by Russia to take possession of any further portion of the Asiatic territories of the Sultan, as fixed by the definite Treaty of Peace, England engages to join the Sultan in defending them by force of arms. In return, the Sultan promises to England to introduce necessary reforms (to be agreed upon later between the two Powers) into the government of the Christian and other subjects of the Porte in these territories; and, in order to enable England to make necessary provision for executing her engagement, the Sultan further consents to assign the Island of Cyprus to be occupied and administered by England."

There is still another point that escaped the eyes of many readers and transcribers. There is no doubt but what the three districts were given up by Russia, but they were not ceded to Turkey, as the inaccurate version had it. The people of these districts were to be allowed to set up whatever government they wished for themselves, with, however, the friendly coöperation and advice of the neighboring states, in particular, Turkey. This was, however, but a veiled cession to the last named Power, as the "plebiscite" which was taken there in July abundantly proved. Although the population was not far from evenly divided between Mohammedan and Christian, something over ninety-seven per cent. voted in favor of annexation to Turkey on what was distinctly a very small vote.<sup>a</sup>

The Erivan side of the question has also considerable interest. Erivan was not given up by Russia for annexation to Turkey, because it would have estranged the supposedly friendly, actually wavering, Government of Persia, from which country Erivan was taken by Russia in 1829. The whole atmosphere of this former government of

<sup>a</sup> Population, 1897 (Russian Census), Christian 200,000, Mohammedan 250,000; Vote, 1918 (under Turkish auspices): for inclusion in Turkey, 85,124—against, 1,924. This includes Alexandropol city as well as Kars and Batum. The figures can only be approximate for 1897.

the Russian Caucasus is Persian-Tartar where it is not Armenian. There is little Turkish about it, in its history or in its people, and its cession to Turkey would have been a distinctly different thing from its return to Persia, with which its history and civilization are most closely connected.

#### SOME TERRITORIAL QUESTIONS BEFORE THE PEACE CONFERENCE

##### *The Banat of Temesvar*

The Banat is a rich, thickly populated province of southern Hungary, claimed by both Serbia and Roumania as an essential part of their reconstructed national territory. Enclosed by the Transylvanian Carpathians on the east and by three rivers flowing into each other on the remaining boundaries, the Maros on the north, the Tisza on the west, and the Danube on the south, it contains a highly mixed population of about a million and a half people.

The Serbs claim that they were the original settlers, and have all during history played a leading part there, as shown by the constitution of a Serbian duchy under the Austro-Hungarian rulers. The Roumanians, on the other hand, state that the Banat, with Transylvania, was the original cradle of their race to which other nationalities came as immigrants.

Ethnologically, the Roumanians are credited with thirty-seven per cent. of the population, the Germans with twenty-five per cent., the Serbs with eighteen per cent. and the Magyars with fifteen per cent. The Banat, however, is divided into three distinct counties where the lines are drawn differently. The eastern mountainous country of Krasso is predominantly Roumanian, with a Roumanian population of 336,082, or seventy-two per cent.; the Germans with 55,883, or twelve per cent.; the Magyars with 33,787, or seven per cent., and the Serbs with 14,993, or three per cent. The central plains country of Temes contains 160,585 Roumanians, or forty per cent.; 120,683 Germans, or thirty per cent.; 57,985 Serbs, or fourteen per cent.; 47,518 Magyars, or twelve per cent. The eastern grain province of Torontal contains 195,104 Serbs, or thirty-three per cent.; 158,312 Germans, or twenty-seven per cent.; 125,041 Magyars, or twenty-one per cent., and 86,168 Roumanians, or fifteen per cent.

Economically, the Serbs claim at least the western, grain-raising half of the Banat as essential, because Jugo-Slavia as a whole has

not sufficient cereals, while Roumania is one of the granaries of Europe. They state also that the whole trade of that section flows out along the lines of the rivers toward Belgrade and the Danube and that the Banat, at least the western part, is naturally part of the Serbian economic system. Roumania claims that the Banat is an indivisible whole economically, geographically, and administratively, and that any ethnic division is impracticable. They claim that their mountain section needs the plains section for food supplies and the rivers to secure an outlet for the trade, especially their lumber.

The Serbs, moreover, desire the Banat, or at least the section nearest them, for strategic reasons to cover the capital at Belgrade and the valley of the Morava, their principal artery of communication. They say it is essential to prevent further invasions of large forces from Hungary, as happened in the attacks on Belgrade during the recent war.

#### *The Duchy of Teschen*

This province, in dispute between Poland and Czecho-Slovakia, is a small but valuable part of the Crownland of Austrian Silesia, located between Prussian Silesia on the north, Galicia on the east, Hungary and the Carpathians on the south, and Moravia on the west. It contains 857 square miles and its population, according to the last Austrian census in 1910, was 434,821. It contains deposits of hard, black, coke-producing coal, essential to the manufacturing centers of Bohemia and the industrialized sections of Austria. Teschen has also considerable value as a railroad center. The main line between the Czechs in Bohemia and the Slovaks in Hungary runs through the frontier city of Oderberg to Kassa, connecting at the former with the main line to Berlin and Budapest. According to the Austrian censuses, the population is given as fifty-four per cent. Poles, twenty-seven per cent. Czechs and seventeen per cent. Germans.

When the Austrian Government collapsed in October, 1918, the people of Teschen organized to preserve law and order. A Czecho National Council was set up over the Czech district and a Polish National Council over the Polish district. On November 5th the two Councils came to an agreement to continue this administration temporarily, the railroad to be under the Poles, the mines to have a joint administration, and nothing to be done by either side to prejudice

the final disposition of the territory or to effect its permanent incorporation with the administration of the Polish or Czecho-Slovak States.

Disputes over the execution of the agreement led to armed conflicts between the Czechs and the Poles. On January 29th the claims of both parties were heard before the Conference of the Great Powers at Paris. It is understood that the Czechs claim all of Teschen, for the reasons that since the Polish princes there accepted the suzerainty of the Kings of Bohemia in the fourteenth century, the district has been part of the lands of the Bohemian Crown; that the coal and coke of the region are essential to the industries of Czecho-Slovakia and are not so vitally essential to Poland; that the railroad through Oderberg forms the only reliable link between the two halves of the Czecho-Slovak State. The Poles propose a division along linguistic lines, such as existed when Austrian administration ceased. Because of their majority in population, such a division would give the Poles control of the railroad and most of the mines.

On February 3d a *modus vivendi* was signed by the representatives of Poland and Czecho-Slovakia and the delegates of the Great Powers. It reads as follows:

The representatives of the Great Powers, having been informed of the conflict which has arisen between the Czechs and Poles in the Principality of Teschen, in consequence of which the mining district of Ostrawa-Karwin and the railway from Oderberg to Teschen and Jablungkau has been occupied by the Czechs, have declared as follows:

In the first instance they think it necessary to remind the nationalities who have engaged to submit the territorial questions which concern them to the Peace Conference, that they are, pending its decision, to refrain from taking as a pawn or from occupying the territories to which they lay claim.

The representatives take note of the engagement by which the Czech Delegates have declared that they were definitively stopping their troops on the line of the railway which runs from Oderberg to Teschen-Jablungkau.

Pending the decisions of the Peace Conference as to the definitive assignment of the territories, that part of the railway line to the north of Teschen and the mining regions will remain in the occupation of Czech troops while the southern section of the line starting from and including the town of Teschen down to Jablungkau will be entrusted to the military supervision of the Poles.

The undersigned consider it indispensable that a Commission of Control should be immediately sent to the spot to avoid any conflict between the Czechs and Poles in the region of Teschen. This Commission, apart from the measures that it will have to prescribe, will proceed to an inquiry on the basis of which the Peace Conference may form its decision in fixing definitively the respective

frontiers of the Czechs and Poles in the contested zone. The seat of this Commission will be situated in the town of Teschen.

In order to seal the entente between two friendly nations which should follow a policy in full accord with that of the Allied and Associated Powers, the representatives of the Great Powers register the promise of the Czech representatives that their country will put at the disposition of the Poles all its available resources in war material and will grant to them every facility for the transit of arms and ammunition.

The exploitation of the mines of the Karwin-Ostrawa district will be carried out in such a way as to avoid all infraction of private property while reserving any police measures which the situation may require. The Commission of Control will be empowered to supervise this and, if necessary, to secure to the Poles that part of the output which may be equitably claimed by them to meet their wants.

It is understood that the local administration will continue to function in accordance with the conditions of the pact of the 5th November, 1918, and that the rights of minorities will be strictly respected.

Pending the decision of the Peace Congress, political elections and military conscription will be suspended in the Principality of Teschen.

No measure implying annexation of all or of a part of the said Principality either to the territory of Poland or of Czechoslovakia taken by interested parties shall have binding force.

The Delegates of the Czech Nation engage to release immediately with their arms and baggage the Polish prisoners taken during the recent conflict.

(Signed) WOODROW WILSON  
D. LLOYD GEORGE  
V. E. ORLANDO  
G. CLEMENCEAU

ROMAN DMOWSKI  
E. BENES

### *Territorial Claims of Greece*

Four accessions of territory are requested by Greece of the Peace Conference.

To the north she asks for northern Epirus, which is a narrow strip of land running inland from the Adriatic on the present northern boundary of Greece and in the southern part of Albania. Greece claims the territory to be predominantly Greek, her figures showing 120,000 Greeks as against 80,000 Albanians, so intermingled that the only solution is to give sole jurisdiction to the predominating interest. The strip is also claimed by Greece on the ground that it will offer a good strategic frontier. The Albanians dispute the Greek claims, maintaining that the territory, especially the city of Goritza, is the center of their intellectual movement, and that to take it from

them would fatally cripple the new state. They further state that a substantial portion of the so-called Greek population uses Albanian as its mother tongue and is consequently of Albanian inclinations.

To the east Greece claims the part of Thrace now in southern Bulgaria and running through to the Black Sea, including Constantinople. The claims are put forward on racial, religious and historical grounds. Assuming that the Turks will be driven from Constantinople and deferring her claim to an international régime of the city, the Greeks assert preponderant rights in Constantinople, because it was the capital of the Greek Empire before the Turkish conquest, and today contains 364,459 Greeks and 449,114 Turks out of a total population of 1,173,673, besides being the seat of the Greek Œcumenical Patriarch. The boundary suggested by Greece for her proposed acquisition in southern Bulgaria would run from Joula, on the present Greco-Bulgarian northeastern frontier, along the Arda to the Maritza, and along the Turko-Bulgarian boundary of 1913 northeast of Kirk-Kilissia to Cape Iniada. The territory includes the harbors of Saloniki, Kavalla and Dedeagatch and a front on the Black Sea. It is claimed by Greece on the principle of nationality, the Greek figures showing 69,000 Bulgarians, 348,000 Greeks and 442,000 Turks. It is expected that Bulgaria will contest this attempt of Greece to cut her off from all outlet to the Ægean.

In Asia Minor Greece would limit the Turk to the interior, where he is in numerical preponderance; create a separate Armenia and allot to Greece most of the vilayet of Aidin, comprising the seaboard of Asia Minor and containing the harbor of Smyrna. The Greeks claim that for 3,000 years their race has held the predominant position along the Asia Minor seaboard, where today they claim a majority of the population, namely, 1,188,359 Greeks against 1,048,359 Mohammedans. They further claim this section under the offer of the Entente made in January, 1915, as the consideration for the entry of Greece into the war. Turkey is expected to contest the Greek claim to the seaboard of Asia Minor, especially if she is deprived of Constantinople and Armenia. Unofficially the Turks already dispute the Greek population figures, not so much as to totals as to their compactness of location, and state that all the rivers, trade routes and economic life of the Turkish territory of Asia Minor flows straight westward down to the Ægean, and that to deprive this territory of the seaboard would be practically to strangle it.

Greece also claims the islands off the coast of Asia Minor, the Dodecanesus and Rhodes, Castellorizo, Imbros and Tenedos, on the ground that they have been Greek for thousands of years, that the present population is eighty per cent. Greek and the culture entirely Greek. The Dodecanesus were allotted to Italy by the so-called Pact of London of April 26, 1915, but Greece hopes that Italy will withdraw from them.

The territorial interests of Greece were presented to the representatives of the Great Powers on February 4th and referred to an expert committee composed of two representatives of the United States, Great Britain, France and Italy. The committee was authorized to consult the representatives of the peoples concerned.

### *The Hedjaz*

The Hedjaz is a rich country fronting on the Red Sea, with a population of 300,000, containing the cities of Mecca and Medina, and claims to have been independent for eight centuries. The Cherif of Mecca, because of his aid to the Entente Allies during the war, was recognized in 1916 as King of the Hedjaz and is represented at the Peace Conference by two delegates. He desires not only the formal recognition of the independence of his own country, but advocates the eventual union into one Pan-Arab Federation of from ten to twelve million Arab-speaking people, occupying a territory one-third in size that of the United States. These populations are included in the countries of Asir and Yemen, south of the Hedjaz on the Red Sea and ruled by local Arab chieftains, and the great Arabian desert lying to the east of the Hedjaz, inhabited by many nomad tribes. No specific requests for changing the status of these countries at present is made by the King of the Hedjaz, but he suggests that the dispositions of the Peace Conference should regard these districts as ultimately a part of a Pan-Arab State.

The King of the Hedjaz further requests that separate autonomous governments be established in Syria and Mesopotamia, with a view to their becoming a part of the Pan-Arab union.

## CHRONICLE OF INTERNATIONAL EVENTS

### WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives Diplomatiques, Paris; *B.*, boletin, bulletin, bolletino; *P. A. U.*, bulletin of the Pan-American Union, Washington; *Cd.*, Great Britain, Parliamentary Papers; *Clunet*, J. de Dr. Int. Privé, Paris; *Current History*—Current History—A Monthly Magazine of the New York Times; *Doc. dipl.*, France, Documents diplomatiques; *B. Rel. Ext.*, Boletin de Relaciones Exteriores; *Dr.*, droit, diritto, derecho; *D. O.*, Diario Oficial; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *L.*, Law; *M.*, Magazine; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Belgium, Moniteur belge; *Martens*, Nouveau recueil général de traités, Leipzig; *Official Bulletin*, Official Bulletin of the United States; *Q.*, Quarterly; *Q. dip.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs G.*, Reichs-Gesetzblatt, Berlin; *Staats*, Staatsblad, Netherlands; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, The Times (London).

#### August, 1916.

- 4 RUMANIA—FRANCE, GREAT BRITAIN, ITALY, RUSSIA. Treaties signed under which Rumania entered the war. Summaries: London *Times*, Feb. 4, 1919; *Temps*, Feb. 3, 1919; *Washington Post*, February 4, 1919.

#### April, 1918.

- 24 BRAZIL. Executive decree issued putting into force the resolutions of Fourth International Conference of American States, 1910, relative to steamship service, commerce customs and statistics, commercial statistics, reorganization of Union of American Republics and interchange of professors and students. *P. A. U.*, 47: 855.

#### September, 1918.

- 20 PERU—URUGUAY. Convention signed relative to diplomas and certificates issued by educational authorities. Summary: *P. A. U.*, 47: 854.



*November, 1918.*

- 13 AUSTRIA-HUNGARY. Emperor Charles abdicated. New York *Times*, November 14, 1918.
- 16 GERMANY. Government formed by Freidrich Ebert. New York *Times*, November 17, 1918.
- 17 SAXE-MEININGEN. Republic proclaimed. London *Times*, November 18, 1918.
- 17 BADEN. Grand Duke Friedrich II of Baden abdicated, and Baden proclaimed a republic. New York *Times*, November 18, 1918.
- 17 SAXE-COBURG—GOTHA. Duke Charles Edward of Saxe-Coburg and Gotha abdicated. New York *Times*, November 18, 1918.
- 17 HUNGARY. Republic proclaimed. New York *Times*, November 18, 1918.
- 22 NORTH SEA REPUBLIC. The United Workers' and Soldiers' Councils proclaimed Oldenburg, Oestfriesland, Bremen, Hamburg and Schleswig-Holstein a North Sea Republic, with Hamburg as capital, London *Times*, November 23, 1918.
- 25 GERMANY. An agreement proclaimed between Ebert Government and Soldiers' and Sailors' Council by which power passed to the Council. New York *Times*, November 26, 1918.
- 26 JUGO-SLAVIA. Crown Prince Alexander appointed regent by National Council of Fiume. New York *Times*, November 26, 1918.

*December, 1918.*

- 15 POLAND—GERMANY. Poland severed relations with Germany. New York *Times*, December 16, 1918.
- 20 GUATEMALA—UNITED STATES. Senate advised and consented to ratification of commercial treaty with Guatemala. *Congressional Record*, December 21, 1918.
- 21 GERMANY. Count Brockdorff-Rantzau appointed foreign secretary. London *Times*, January 2, 1919.
- 27-29 Congress of the League of the Rights of Man. Held in Paris. *La Paix par le Droit*, 29: 29.
- 31 FINLAND. Prince Friedrich Karl of Hesse announced through Finnish Legation in Berlin that he definitely renounced the crown of Finland. London *Times*, January 1, 1919.
- 31 PERU—GREAT BRITAIN. Canada adhered to arbitration convention between Peru and Great Britain. *P. A. U.*, 47: 856.

*January, 1919.*

- 2 AUSTRIA. German-Austrian Government transmits note to diplomatic corps in Vienna asking recognition of the State of German-Austria. Demanding plebiscite for towns exclusively German, such as Marburg, Radkeisburg, Klagensfurt, Villach, Bozen, and Brumex, and asserting that republic must either form part of a Danube confederation or be attached to Germany. Summary: *New York Times*, January 3, 1919.
- 2 SYRIA AND ASIA MINOR. Decree issued raising blockade. *London Gazette*, January 1, 2, 1919.
- 4 COUNT VON HERTLING. Died. German Chancellor, October, 1917, to September, 1918. *New York Times*, January 5, 1919.
- 4 UNITED STATES—GERMANY. Department of State made public agreement as to exchange and treatment of prisoners. *New York Times*, January 5, 1919.
- 4 JAPAN—CHINA. Texts of notes exchanged in 1915, published in *Peking Leader*. *London Times*, January 11, 1919.
- 5 UNITED KINGDOM OF SERBIANS, CROATS AND SLOVENES. Governments of the Entente and neutrals notified that the government formed at Belgrade by representatives of Jugo-Slavic provinces, Serbie, Bosnia, Herzegovina, Dalmatia, Croatia, and the Slovene districts had become the United Kingdom of Serbians, Croats and Slovenes. *London Times*, January 6, 1919.
- 5 UKRAINE. Republic of Western Ukraine, formerly Eastern Galicia, joined Greater Ukraine, in a provisional government headed by Dr. Holubavitch. *Times*, January 8, 1919.
- 6 THEODORE ROOSEVELT. Died. *New York Times*, January 7, 1919.
- 6 GREAT BRITAIN—FRANCE. Announced that a secret treaty gave Great Britain Mesopotamia and arranged future of Asia Minor. *New York Times*, January 7, 1919.
- 6 POLAND. Germany reported agreement reached to end hostilities. *New York Tribune*, January 7, 1919.
- 6 RUSSIA—GERMANY. Germany severed diplomatic relations with Russia. *New York Times*, January 7, 1919.
- 7 MEXICO—UNITED STATES. Mexican note to the United States relative to oil situation and decrees made public. *New York American*, January 8, 1919.

- 8 LUXEMBURG. Luxemburg formally places itself under the protection of the Entente. *Washington Post*, January 9, 1919.
- 9 BULGARIA. Embargo law passed. List: *Official Bulletin*, March 26, 27, 1919.
- 11 TRANSYLVANIA—ROUMANIA. Roumanian decree published definitely attaching Transylvania to Roumania. The Roumanians of Transylvania declared their independence of Hungary on December 2, formed a separate government under Dr. Julius Marrill and sent a delegation to wait on King Ferdinand of Roumania. *London Times*, January 13, 1919.
- 11 LUXEMBURG. A republic was proclaimed and lasted six hours, French troops restoring order. *New York Times*, January 12, 14, 1919.
- 11 JAPAN. Announced that Japan had acquired Russia's holdings in Manchuria. *New York Herald*, January 12, 1919.
- 12 NORWAY—UNITED STATES. Norway protested against the bill introduced into Congress aiming to deport aliens who evaded army service by withdrawing their first citizenship papers. *New York Tribune*, January 12, 1919.
- 13 MONTENEGRO—ITALY. Montenegro protested to Italy against presence of Italian troops, and formally asked for their withdrawal. *New York Sun*, January 14, 1919.
- 13 CUXHAVEN BOLSHEVIST REPUBLIC. Declaration of independence made. This government collapsed on January 18, 1919. *Washington Post*, January 19, 1919.
- 14 HUNGARY. Count Karolyi elected provisional president of Hungary. *New York Times*, January 15, 1919.
- 15 PEACE CONFERENCE. Rules announced. *New York Times*, January 16, 1919.
- 15 KOREA. Officially appeals to President Wilson to help her resist annexation to Japan. *New York American*, January 16, 1919.
- 15 LUXEMBURG. Princess Charlotte succeeded her elder sister, Marie Adelaide, as Grand Duchess of Luxemburg. *New York Times*, January 16, 1919.
- 16 LITHUANIA—POLAND. Lithuania placed under a Polish protectorate. *New York Times*, January 17, 1919.
- 16 GERMANY. Chancellor Ebert and ministers form a new republic of fifteen states. This includes German Austria. *New York Times*, January 17, 1919.

- 16 BRAZIL. President-elect, Dr. Alves, died. *New York Times*, January 17, 1919.
- 17 POLAND. Ignace Paderewski named Premier of Poland. *New York Times*, January 18, 1919.
- 17 ARMISTICE. The commissioners conclude sessions at Treves and extend the armistice until February 17. *New York Times*, January 18, 1919.
- 18 UKRAINE-SOVIET REPUBLIC OF RUSSIA. The Ukranian Directory declared Ukraine to be in a state of war with the Soviet Republic. *London Times*, January 24, 1919.
- 18 PEACE CONFERENCE. The Peace Conference opened in the French Ministry of Foreign Affairs. Georges Clemenceau, Premier of France, was elected President, being nominated by President Wilson. *New York Times*, January 19, 1919. Rules governing Conference: *New York Times*, January 20, 1919. Personnel of organization: *New York Times*, January 31, 1919. Text of speeches, Who's Who, etc., *London Times*, January 20, 23, 1919.
- 18 RUSSIA. The Russian Bolsheviki ask the Entente to make peace. *Washington Evening Star*, January 19, 1919.
- 21 IRELAND. Sinn Fein members elected to Parliament met at Dublin, read a declaration of independence and proclaimed an Irish Republic. *London Times*, January 22, 1919.
- 25 LEAGUE OF NATIONS. Peace Conference adopted a resolution to the effect that the establishment of a League of Nations should be made an integral part of peace treaty. Text of resolution: *Official Bulletin*, March 17, 1919.
- 26 POLAND—UKRAINIA. Pope Benedict asked the Poles and Ukrainians to mediate their differences. *New York Sun*, January 27, 1919.
- 29 POLAND—UNITED STATES. Secretary Lansing extends recognition of the United States to the new Polish Government under Paderewski. *New York Times*, January 30, 1919.
- 29 FINLAND—FRANCE. France proposes that Finland be recognized as a nation. *New York Tribune*, January 30, 1919.
- 30 TURKEY—GERMANY. Secret treaty discovered showing German plan for dividing Russia. *New York Tribune*, January 31, 1919.

*February, 1919.*

- 1 UNITED STATES. Announced that trade treaties affected by the Seaman's Act of 1915, are nullified. The agreement with Norway will stand with two sections omitted. *Washington Herald*, February 2, 1919.
- 3 INTERNATIONAL SOCIALIST CONFERENCE met at Berne. There were 120 delegates representing 12 countries. *New York Herald*, February 4, 1919; *New Europe*, 10:36.
- 3 PORTUGAL. New Government formed. Personnel: *New York Times*, February 3, 1919.
- 3 FIUME. A plea for permission to join Italy sent to President Wilson by Fiume. *Washington Post*, February 4, 1919.
- 5 POLAND—CZECHO-SLOVAKIA. Armistice signed. *Washington Post*, February 6, 1919.
- 6 GERMANY. National Convention met at Weimar. Proceedings: *New York Times*, February 7, 1919; *Current History*, 9 (Pt. 2): 429.
- 6 RUSSIA. The Russian Bolshevik Government accepts invitation of the Paris Peace Conference to hold a parley at Princes Island. *New York Times*, February 7, 1919; *Current History*, 9 (Pt. 2): 407.
- 6 GREAT BRITAIN—UNITED STATES. British embargo modified as to American shoes. *New York Herald*, February 6, 1919.
- 6 PEACE CONFERENCE. A Blockade Council has been formed to consider lowering the bars on imports to Germany. *New York Times*, February 7, 1919.
- 6 ALAND ISLANDS. The inhabitants of the Aland Islands ask to be allowed to join Sweden. *New York Sun*, February 7, 1919.
- 7 UNITED STATES—JUGO-SLAV STATE. The United States, through Secretary Lansing, welcomes the Jugo-Slav Union. *Washington Post*, February 8, 1919; text of note: *London Times*, February 8, 1919.
- 7 GERMANY—POLAND. Germany denies a truce to Poland and demands the evacuation of the province of Posen. *New York Times*, February 8, 1919.
- 7 POLAND—CZECHO-SLOVAKIA. Relations broken off and invasion of Galicia is reported. *New York Times*, February 8, 1919.

- 8 UNITED STATES. Appropriation asked for appointment of ministers to Poland and Czecho-Slovakia. H. J. Res., 407, 408; *Congressional Record*, February 8, 1919, pp. 3009, 3144.
- 11 ITALY—JUGO-SLAVIA. Jugo-Slav delegates ask President Wilson to act as arbitrator in dispute with Italy regarding eastern coast of Adriatic. *Review of Reviews*, 59:247.
- 11 GERMANY. Philip Schiedemann appointed Chancellor. *New York Times*, February 12, 1919.
- 11 SALONIKA. Union with Greece asked by Salonika. *New York Times*, February 12, 1919.
- 11 GERMANY. The National Assembly at Weimar elected Frederick Ebert President of the German state by a vote of 277 to 102. A temporary constitution was adopted. The name "empire" was retained, although it was sought to substitute the word "republic." *New York Times*, February 12, 1919; personnel of government: *Current History*, 9 (Pt. 2):429.
- 12 UNITED STATES—JAPAN. United States formally accepted Japanese plan for restoration of Siberian Railway traffic. *London Times*, February 13, 1919.
- 12 JAPAN—CHINA. Japan orders disclosure of all her secret treaties with China. *Washington Post*, February 13, 1919.
- 14 LEAGUE OF NATIONS. Draft presented by President Wilson to the Peace Conference. Text: *New York Times*, February 15, 1919.
- 16 Armistice of November 11, 1918, prolonged by the conventions of December 13, 1918, and January 16, 1919, to February 17, 1919, was again extended for a short period, date of termination not specified, which period the Allied and Associated Powers reserved the right of ending at three days' notice. *Current History*, 9 (Pt. 2):410; 10 (Pt. 1):23.
- 17 Sir Wilfred Laurier, former Premier of Canada, died. *New York Times*, February 18, 1919.
- 17 ROUMANIA. Right asked to patrol Bulgarian frontier. *New York Tribune*, February 19, 1919.
- 18 MONTENEGRO. Personnel of new cabinet. *New York Sun*, February 19, 1919.
- 18 GREAT BRITAIN. Blockade modified to allow food to go to Germany. *New York Times*, February 19, 1919.

- 20 AFGHANISTAN. Death of the Ameer of Afghanistan. London *Times*, February 25, 1919.
- 20 POLAND—GERMANY. Berlin announces that hostilities with Poland are ended. *Washington Post*, February 21, 1919.
- 20 GERMAN-AUSTRIAN REPUBLIC. Dr. Adler, who assassinated Premier Stuerkli in 1916, proclaimed president by defense troops. *Washington Post*, February 21, 1919.
- 22 BAVARIA. Soviet Republic declared. New York *Times*, February 23, 1919.
- 22 BRAZIL. Brazil establishes a Pan-American Bureau. Washington *Evening Star*, February 23, 1919.
- 25 UNITED STATES. President Wilson arrived in Boston from Europe. New York *Times*, February 26, 1919.
- 25 JAPAN—CHINA. Announced that between 70 and 80 treaties are in existence between Japan and China. *Washington Post*, February 26, 1919.
- 25 FRANCE—POLAND. Recognition by France announced in Polish Diet at Warsaw. New York *Herald*, February 26, 1919.
- 26 COLMAR. The City of Colmar rejects the plebiscite on the grounds that the citizens of Colmar are all French. New York *Sun*, February 27, 1919.
- 27 CROATIA—SERBIA—ALBANIA. The Croations have joined with the Albanians in armed resistance to Serbia. New York *Tribune*, February 28, 1919.

*March, 1919.*

- 2 MEXICO—GERMANY. The Ebert Government recognized by Mexico. London *Times*, March 3, 1919.
- 4 UNITED STATES. President Wilson sailed for Europe. New York *Times*, March 5, 1919.
- 4 AFGHANISTAN. The third son of the late Amir assumed the government. New York *Sun*, March 5, 1919.
- 4 PRUSSIA. Constituent assembly met. London *Times*, March 5, 1919.
- 6 IRELAND. Irish National Assembly elects Edward DeValera first president of the Irish Republic. London *Times*, March 7, 1919.
- 21 HUNGARY. Hungarian Government seized by communist revolutionary party under Bolshevik leadership. Personnel of new government: *Official Bulletin*, March 25, 1919.

- 24 LITHUANIA—GREAT BRITAIN. Commercial treaty signed. *Washington Post*, March 25, 1919.
- 24 TYROL. Republic declared under the presidency of Dr. Schraffe. *Contemporary R.*, 115:171.
- 27 BESSARABIA. Reported to have proclaimed its independence and set up a Soviet Republic. *New York Times*, March 28, 1919.
- 28 HUNGARY—SERBIA. Hungary declared war on Serbia. *New York Times*, March 29, 1919. On May 11, 1919, sixteen wars were in operation as follows: Bolsheviks vs. Allies, Bolsheviks vs. Russian Loyalists, Bolsheviks vs. Ukrainians, Bolsheviks vs. Germans, Bolsheviks vs. Poles, Bolsheviks vs. Rumanians, Bolsheviks vs. Letts, Bolsheviks vs. Finns, Bolsheviks vs. Lithuanians, Poles vs. Germans, Poles vs. Ruthenians, Poles vs. Czecho-Slovaks, Germans vs. Letts, Austrians vs. Jugo-Slavs, Hungarians vs. Serbian State, Bulgàr Royalists vs. Bulgar Reds. *New York Times Magazine*, May 11, 1919.
- 28 GERMAN-AUSTRIA—SWITZERLAND. Delegates from German-Austria reported to have made offer to Switzerland relative to annexation. *Washington Post*, March 29, 1919.
- 28 POLAND. Formal request made by Poland for alliance with the Entente Powers. *Washington Post*, March 29, 1919.
- 29 CHILE—GREAT BRITAIN. Arbitration treaty signed. *New York Times*, March 30, 1919.
- 31 ENTENTE ALLIES. The Allies declared Fiume to be in a state of siege. *New York Times*, April 1, 1919.
- 31 ADRIATIC. The blockade of the Adriatic ceased at midnight, March 30. *New York Times*, April 1, 1919.

KATHRYN SELLERS.



## PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

### GREAT BRITAIN <sup>1</sup>

Aliens' Restriction Order. Order in Council further amending. Dec. 18, 1918. (St. R. & O. 1918, No. 1710.) 1s. ½d.

———. Feb. 24, 1919. (St. R. & O. 1919, No. 195.) 1s. ½d.

British and Foreign State Papers. Vol. 108, Part II. 10s. 6d.

British War Graves in France. Agreement between the United Kingdom and France respecting. Signed at Paris, Nov. 26, 1918. (Treaty Series, 1919, No. 1.) 1s. ½d.

Defense of the Realm Manual (6th edition), revised to Aug. 31, 1918. Comprising introductory note; the Defense of the Realm Acts, as passed, with notes; the Defence of the Realm Regulations, as amended to Aug. 31, 1918, printed in consolidated form, as provided by Order in Council, with notes; orders of a general character made under the Regulations to Aug. 31, 1918, other than orders falling within the Food Supply, Food Production, War Material Supplies, and Financial Manuals, with notes; Evidence Amendment Act, 1915; Suspension of Trial by Jury in Ireland; Rules under Defense of the Realm Acquisition of Land Act; Order in Council Establishing the Surplus Government Property Advisory Council and Disposal Board; analytical index to Acts, Regulations, Orders, and Notes. 5s. 6d.

Exportations to Switzerland, Proclamation withdrawing prohibition of certain. March 12, 1919. (St. R. & O. 1919, No. 261.) 1s. ½d.

League of Nations, Draft agreement for, presented to the plenary interallied conference of Feb. 14, 1919. Miscellaneous, No. 1 (1919). 1s. ½d.

Prize Money, Proclamation regulating the distribution of, to the Fleet. Feb. 10, 1919. (St. R. & O. 1919, No. 154.) 1s. ½d.

Safety of Life at Sea. Order in Council further postponing the

<sup>1</sup> Parliamentary and Official Publications of Great Britain may be obtained, for the amount noted, from the Superintendent of Publications, H. M. Stationery Office, Imperial House, Kingsway, London, W. C. 2.

coming into operation of the Merchant Shipping Convention Act, 1914, until July 1, 1919. Dec. 18, 1918. (St. R. & O. 1918, No. 1807.) 1s. ½d.

Shipping and Shipbuilding Industries after the War, Reports of the Departmental Committee appointed by the Board of Trade to consider the position of the. First report (Nov., 1916). The German Control Stations and the Atlantic Emigrant Traffic. Second report (July, 1917). Shipbuilding and Marine Engineering. Final report (March, 1918). Reconstruction of the British Mercantile Marine; International Competition and Navigation Policy; General Recommendations; Summary. With Appendices. 2s. 4d.

Trading with Alsace-Lorraine and territories of Austria-Hungary in the occupation of the armies of the Associated Governments. Proclamations licensing trade with. Feb. 10, 1919. (St. R. & O. 1919, Nos. 152 and 153.) 1s. ½d. each.

Trading with the Enemy. (General Licenses.) Repair of enemy merchant ships under the control of the Allied Maritime Transport Council. Jan. 3, 1919. Trading with Palestine and Syria. Jan. 6, 1919. Trading with the occupied territories of the left bank of the Rhine. Jan. 6, 1919. Trading with Czecho-Slovakia. Feb. 8, 1919. Trading with Turkey and Bulgaria. Feb. 17, 1919. Trading with Croatia and Slavonia, Bosnia, Herzegovina, and parts of Dalmatia not covered by proclamation of Feb. 10, 1919. (St. R. & O. 1919, Nos. 301-306.) 1s. ½d. each.

War of 1914-1918. The Outbreak of the War. A narrative based mainly on British official documents. By C. Oman. 2s. 10d.

#### UNITED STATES <sup>2</sup>

Aeronautics, Regulation of civil aërial navigation, including estimate of appropriation, proposed draft of legislation recommended for regulation of civil aërial navigation. Feb. 26, 1919. 3 p. (H. doc. 1828.) *National Advisory Committee for Aeronautics.*

Alien Enemy. Opinion of District Court for Southern District of New York, relating to Sec. 4067 R. S. and what constitutes an alien enemy. 1919. 9 p. (Bulletin 188.) *Justice Dept.*

———. Opinion of District Court for Southern District of New

<sup>2</sup> Where prices are given, the document in question may be obtained, for the amount noted, from the Superintendent of Documents, Government Printing Office, Washington, D. C.

York relating to jurisdiction of courts to release from custody under Presidential warrant, to review decisions of Executive Department on question of enemy alienage, burden of proof, and effect of decision on draft board. 1919. 21 p. (Bulletin 193.) *Justice Dept.*

Alien Property Custodian, Information relative to activities of. March 1, 1919. 2 p. (S. doc. 439.) *Alien Property Custodian.*

Aliens. Report showing number of citizens and subjects of countries neutral during the war with Germany who had declared their intention to become citizens of United States, but chose to withdraw their declarations of such intention in order to evade military service. Jan. 6, 1919. 1 p. (S. doc. 322.) *War Dept.*

———. Report to accompany H. R. 15098 to expel and exclude certain undesirable aliens from United States. Jan. 28, 1919. 2 p. (H. rp. 1000.) *Immigration and Naturalization Committee.*

———. Report to accompany H. R. 16017 to expel and exclude certain undesirable aliens from United States. Feb. 19, 1919. 2 p. (H. rp. 1093.) *Immigration and Naturalization Committee.*

———. Statement of Alfred Bettman on deportation of interned aliens. Jan. 16, 1919. 19 p. *Immigration and Naturalization Committee.*

American Committee for Relief in Near East. Report to accompany S. 4785 to incorporate. Feb. 22, 1919. 5 p. (H. rp. 1125.) *Judiciary Committee.*

American Relief Administration. Executive order appointing Herbert Hoover director general of American Relief Administration, which he is authorized to establish, and giving him full power to distribute foodstuffs and other urgent supplies to certain countries in Europe in whatever way he deems best, particularly through Food Administration Grain Corporation. Feb. 24, 1919. (No. 3035B.)

Arbitration. Agreement between United States and Japan extending duration of convention of May 5, 1908; signed Washington, Aug. 23, 1918. 4 p. (Treaty series 639.) *State Dept.*

Armenia and Her Claims to Freedom and National Independence. Memorandum presented to Democratic Mid-Europe Union by G. Pastermadjian, special envoy of the Catholicos of all Armenians, and by Miran Sevasly, chairman of Armenian National Union of America and representative of Armenian National Delegation. 1919. 20 p. (S. doc. 316.) *Senate.*

Birds. Convention between United States and Great Britain for

the protection of migratory birds; signed Washington, Aug. 16, 1916. 6 p. (Treaty series 628.) *State Dept.*

Cables, Submarine. Executive order amending order of Sept. 26, 1918, so as to remove restrictions on points on or near Mexican border. Jan. 25, 1919. (No. 3030.) *State Dept.*

China. Conduct of business with China, with bibliographies. 1919. 47 p. (Miscellaneous series 70.) Paper, 10c.

Diplomatic and Consular Appropriation Bill. Letters of Frank L. Polk and John Barrett. 1919. 11 p. *Foreign Affairs Committee.*

———. Hearings, Dec. 11–21, 1918. 153 p. *Foreign Affairs Committee.*

———. Report to accompany. Jan. 15, 1919. 3 p. (H. rp. 935.) *Foreign Affairs Committee.*

———. Hearings before sub-committee on. 1919. 34 p.; report to accompany, Feb. 7, 1919. 2 p. (S. rp. 698.) *Appropriations Committee.*

Diplomatic and Consular Service of United States. Corrected to Dec. 23, 1918. 53 p. *State Dept.*

German Plots and Intrigues in United States during period of our neutrality; by Earl E. Sperry, assisted by Willis M. West. July, 1918. 64 p. (Red, White and Blue Series 10.) *Committee on Public Information.*

Hawaii. Report to accompany S. 1765 to reimburse fire insurance companies for payments made for property destroyed by fire in suppressing bubonic plague in Hawaii. Feb. 11, 1919. 9 p. (S. rp. 705.) *Claims Committee.*

Immigration. Hearings on H. R. 13325, 13669, 13904, and 14577 for prohibition of immigration. Statements of Louis Marshall and others. 1919. Pts. 1-5, 298 p. *Immigration and Naturalization Committee.*

———. Report to accompany H. R. 15302 to prohibit immigration for four years. Jan. 29, 1919. 8 p. (H. rp. 1015, pt. 1.) Minority views, Feb. 3, 1919. 1 p. (H. rp. 1015, pt. 2.) *Immigration and Naturalization Committee.*

Indemnity for Losses Sustained by Madame Crignier, as result of search for body of John Paul Jones. Report to accompany S. 4727 to authorize payment to Government of France. Jan. 31, 1919. (H. rp. 1020.) *Foreign Affairs Committee.*

International High Commission. Addresses delivered on occasion

of formal transfer of chairmanship of commission by W. G. McAdoo to Carter Glass, Washington, D. C., Dec. 30, 1918. 10 p. Same in Spanish. *International High Commission*.

International Joint Commission on Boundary Waters between United States and Canada. Final report on pollution of boundary waters reference. 1918. 56 p. [Includes list of publications of Commission relative to pollution of boundary waters.] *State Dept.*

Irish Question. Hearings on H. J. Res. 357, requesting commissioners of United States to present to the international peace conference the right of Ireland to freedom, independence, and self-determination. Dec. 12, 1918. 158 p., il. (H. Doc. 1832.) *Foreign Affairs Committee*.

———. Report to accompany H. J. Res. 357. Feb. 11, 1919. 1 p. (H. rp. 1054.) *Foreign Affairs Committee*.

Japan. Study of trade of Japan during the war, with special reference to trade with United States. 1919. 147 p., il. Paper, 15c.

League of Nations. Address delivered by President Wilson at Boston, Mass., Feb. 24, 1919, on plan for. 8 p. (S. doc. 431.)

———. Address on maintenance of peace delivered at commencement exercises at Union College, Schenectady, N. Y., June 9, 1919, by Henry Cabot Lodge. 1919. 6 p. (S. doc. 443.) *Senate*.

———. Report on plan for League of Nations made by President of United States on behalf of commission constituted by preliminary peace conference in session at Paris, France, also address of the President in relation thereto. 15 p. (S. doc. 389.) *Senate*.

Lithuania. Statement setting forth claim for independent government and freedom in terms of peace for Lithuania, by Lithuanian National Council in United States. 1918. 60 p., il. (S. doc. 305.) *Senate*.

Maritime Law. Laws of maritime warfare affecting rights and duties of belligerents, as existing Aug. 1, 1914; prepared by Harold H. Martin and Joseph R. Baker. May, 1918. 600 p. Paper, 45c.

Merchant Marine. Plan for operation of new American merchant marine, as proposed by Edward N. Hurley. March 27, 1919. 16 p. *Shipping Board*.

———. World shipping data. Report on European Mission. By Edward N. Hurley. March 1, 1919. 32 p. *Shipping Board*.

Mexico. Report of commission appointed by War Department to

investigate claims growing out of insurrection in Mexico. Report to accompany S. J. Res. 175 to authorize Secretary of War to pay said claims. Feb. 6, 1919. 18 p. (H. rp. 1040.) *Military Affairs Committee*.

Passports. Executive order amending order of Aug. 8, 1918, which prescribed rules and regulations governing issuance of permits to depart from and to enter United States. March 3, 1919. (No. 3058.) *State Dept.*

Prisoners of War. Agreement between the United States and Germany concerning prisoners of war, sanitary personnel, and civil prisoners; signed at Berne, Nov. 11, 1918. *State Dept.*

Radiotelegraphy. Hearings on H. R. 13159 to further regulate radio communication. Dec. 12-19, 1918. 476 p. *Merchant Marine and Fisheries Committee*.

———. Letter transmitting correspondence relating to subject of an interallied radio conference. March 1, 1919. 14 p. (H. doc. 1837.) *Navy Dept.*

Reciprocity and Commercial Treaties. 1919. 535 p., il. 2 pl. Paper, 50c.

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War Charities. Hearings on S. 4972, to regulate collection and expenditure of money other than by Government of United States or by its authority, for use and benefit of armed forces of United States and of its allies, or for any auxiliary organizations maintained and operated for use and benefit of such armed forces. [Includes Report on investigation of war charities by Edwin P. Kilroe, Assistant District Attorney, New York, N. Y., Jan. 1, 1919, and partial list of organizations, committees and funds investigated and witnesses examined.] 1919. 96 p. *Military Affairs Committee*.

War Contributions. Report to accompany H. R. 5777 to refund to Frederick City, Md., sum of \$200,000 exacted by Confederate Army, July 9, 1864, under penalty of burning said city. Jan. 27, 1919. 28 p. (H. rp. 999.) *War Claims Committee*.

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———. Outline of origin, functions, and organization; compiled as of Nov. 10, 1918. 52 p. 1 pl. *War Industries Board*.

War Trade Board. Executive order authorizing transfer of duties, powers, functions, records and properties to Department of State, March 3, 1919. (No. 3059.) *State Dept.*

GEO. A. FINCH.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF  
INTERNATIONAL LAW

SANDBERG ET AL. v. M'DONALD,  
CLAIMANT OF THE BRITISH SHIP "TALUS"<sup>1</sup>

*Supreme Court of the United States*

Decided December 23, 1918

MR. JUSTICE DAY delivered the opinion of the court.

This case brings before us for consideration certain features of the so-called "Seaman's Act." (38 Stat. 1164.) The Act is entitled: "An Act to promote the welfare of American seamen in the merchant marine of the United States; to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto, and to promote safety at sea." It contains numerous provisions intended to secure better treatment of seamen, and to secure for them better conditions of service.

The libel charges a demand in Mobile, Alabama, for one-half part of the wages then earned by the seamen, and the refusal of the master to pay the amount which the libelants claimed to be due. The master paid each of them what he conceived to be due, deducting certain advances made to the men at Liverpool, England, where the seamen were signed.

The facts are:

The *Talus* is a British ship and the libelants and petitioners citizens or subjects of nations other than the United States and at the time of employment by the ship and before boarding her they received certain advances at Liverpool by the ship or its agents, a practice usual and customary and not forbidden by the laws of Great Britain. The advance did not, as to any libelant, exceed the amount of a month's wages.

The libelants boarded the ship at Dublin, Ireland, December 1,

<sup>1</sup> 248 U. S. 185.



1916, and remained in her service until they left her at Mobile, Alabama.

The ship arrived in American waters on February 11, 1917, off Fort Morgan, from whence she proceeded immediately to Mobile, where she remained until after February 24, and unloaded and loaded cargoes. During the voyage and at Mobile prior to February 22, libelants received certain payments from the ship in cash and in articles purchased from it.

On February 22 libelants demanded of the master of the ship payment of one-half of the wages earned by them to that date. The master then paid to them a sum which, with the cash paid them and the price of the articles purchased as stated above, together with the advances made in Liverpool, equaled or exceeded the one-half of the wages then earned by each of them from the commencement of his service for the ship. It was less, however, than such one-half wages if the advances at Liverpool had not been included in the credits. The master claimed that those advances should be deducted from the one-half wages, and did deduct them, and the sum or sums paid by the master to the libelants exceeded the amount of wages earned by them for the eleven days the ship had been in American waters. The libelants quit the ship February 24, 1917, and were logged as deserters on the same day.

Under the foregoing statement of facts the question for decision is: Was the master entitled to make deduction from the seamen's pay in the amount of the advancements made at Liverpool? The District Court held that these advancements could not be deducted. 242 Fed. Rep. 954. The Circuit Court of Appeals reached the opposite conclusion. 248 Fed. Rep. 670. The pertinent section of the Act for consideration reads:

SEC. [11] 10. (a). That it shall be, and is hereby, made unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages, or to make any order, or note, or other evidence of indebtedness therefor to any other person, or to pay any person, for the shipment of seamen when payment is deducted or to be deducted from a seaman's wages. Any person violating any of the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than \$25 nor more than \$100, and may also be imprisoned for a period of not exceeding six months, at the discretion of the court. The payment of such advance wages or allotment shall in no case, except as herein provided, absolve the vessel or the master or the owner

thereof from the full payment of wages after the same shall have been actually earned, and shall be no defense to a libel suit or action for the recovery of such wages. If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offense be deemed guilty of a misdemeanor and shall be imprisoned not more than six months or fined not more than \$500.

\* \* \* \*

(e) That this section shall apply as well to foreign vessels while in waters of the United States as to vessels of the United States, and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for similar violation.

The master, owner, consignee, or agent of any vessel of the United States, or of any foreign vessel seeking clearance from a port of the United States, shall present his shipping articles at the office of clearance, and no clearance shall be granted any such vessel unless the provisions of this section have been complied with.

The genesis and history of this legislation is found in U. S. Compiled Statutes, 1916, Vol. 7, § 8323, annotated.

The Dingley Act of 1884 (23 Stat. 55, 56), which is the origin of this section, contains terms much like those found in this Act. That statute, as the present one, in the aspect now before us, was intended to prevent the evils arising from advanced payments to seamen, and to protect them against a class of persons who took advantage of their necessities and through whom vessels were obliged to provide themselves with seamen. These persons obtained assignments of the advanced wages of sailors. In many instances this was accomplished with little or no service to the men who were obliged to obtain employment through such agencies. In the Dingley Act it was made unlawful to pay seamen's wages before leaving the port at which he was engaged. In the present Act it is made unlawful to pay seamen's wages in advance of the time when he has actually earned the same. The Act of 1884 by its terms applied as well to foreign vessels as to the vessels of the United States, and masters of foreign vessels violating the law were refused clearance from any port of the United States. The present statute is made to apply as well to foreign vessels while in the waters of the United States as to vessels of the United States.

In the present statute, in the section from which we have just quoted, masters, owners, consignees, or owners of foreign vessels are

made liable to the same penalties as are the like persons in case of vessels of the United States. Such persons, in case the vessels are those of the United States or foreign vessels, seeking clearance in ports of the United States, are required to present their shipping articles at the office of clearance, and no clearance is permitted unless the provisions of the statute are complied with.

The Act of 1884 came before the United States District Court for the Southern District of New York in the case of *The State of Maine*, 22 Fed. Rep. 734. In a clear and well-reasoned opinion by Judge Addison Brown, the law was held not to apply to the shipment of seamen on American vessels in foreign ports. After some amendments in 1898, not important to consider in this connection, the matter came before this court in the case of *Patterson v. Bark Eudora*, 190 U. S. 169, and it was held to apply to a British vessel shipping seamen at an American port, and, furthermore, that the Act, as thus applied to a foreign vessel in United States waters, was constitutional.

While the Seaman's Act of 1915 contains many provisions for the amelioration of conditions as to employment and care of seamen, in the aspect now involved we have called attention to the state of legislation and judicial decision when that Act was passed. Did Congress intend to make invalid the contracts of foreign seamen so far as advance payments of wages is concerned, when the contract and payment was made in a foreign country where the law sanctioned such contract and payment? Conceding for the present purpose that Congress might have legislated to annul such contracts as a condition upon which foreign vessels might enter the ports of the United States, it is to be noted that such sweeping and important requirement is not found specifically made in the statute. Had Congress intended to make void such contracts and payments, a few words would have stated that intention, not leaving such an important regulation to be gathered from implication. There is nothing to indicate an intention, so far as the language of the statute is concerned, to control such matters otherwise than in the ports of the United States. The statute makes the payment of advance wages unlawful and affixes penalties for its violation, and provides that such advancements shall in no cases, except as in the Act provided, absolve the master from full payment after the wages are earned, and shall be no defense to a libel or suit for wages. How far was this intended to apply to

foreign vessels? We find the answer if we look to the language of the Act itself. It reads that this section shall apply to foreign vessels "while in waters of the United States."

Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 357. In *Patterson v. Bark Eudora*, *supra*, this court declared such legislation as to foreign vessels in United States ports to be constitutional. We think that there is nothing in this section to show that Congress intended to take over the control of such contracts and payments as to foreign vessels except while they were in our ports. Congress could not prevent the making of such contracts in other jurisdictions. If they saw fit to do so, foreign countries would continue to permit such contracts and advance payments no matter what our declared law or policy in regard to them might be as to vessels coming to our ports.

In the same section, which thus applies the law to foreign vessels while in waters of the United States, it is provided that the master, owner, consignee, or agent of any such vessel who violates the provision of the Act shall be liable to the same penalty as would be persons of like character in respect to a vessel of the United States. This provision seems to us of great importance as evidencing the legislative intent to deal civilly and criminally with matters in our own jurisdiction. Congress certainly did not intend to punish criminally acts done within a foreign jurisdiction; a purpose so wholly futile is not to be attributed to Congress. *United States v. Freeman*, 239 U. S. 117, 120. The criminal provision strengthens the presumption that Congress intended to deal only with acts committed within the jurisdiction of the United States.

It is true the act provides for the abrogation of inconsistent treaty provisions, but this provision has ample applications treating the statute to mean what we have here held to be its proper construction. It abolishes the right of arrest for desertion. It gives to the civil courts of the United States jurisdiction over wage controversies arising within our jurisdiction. These considerations amply account for the treaty provisions. See *Treaties in Force*, ed. 1904, index, p. 969.

It is said that the advances in foreign ports are against the policy of the United States and, therefore, not to be sanctioned here. As we have construed this section of the statute, no such policy as to foreign contracts, legal where made, is declared.

We have examined the references in the briefs of counsel to the reports and proceedings in Congress during the progress of this legislation so far as the same may have weight in determining the construction of this section of the act. We find nothing in them, so far as entitled to consideration, which requires a different meaning to be given the statute. We may add that the construction now given has the sanction of the Executive Department as shown in Instructions to Consular Officers, promulgated through the medium of the State Department.

We are of opinion that the Circuit Court of Appeals reached the right conclusion as to the meaning and interpretation of this section of the act, and its judgment is *Affirmed.*

TURNER v. UNITED STATES AND CREEK NATION OF INDIANS<sup>1</sup>

*Supreme Court of the United States*

Decided January 7, 1919

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Creek or Muskogee Nation or Tribe of Indians had, in 1890, a population of 15,000. Subject to the control of Congress, they then exercised within a defined territory the powers of a sovereign people; having a tribal organization, their own system of laws, and a government with the usual branches, executive, legislative, and judicial. The territory was divided into six districts, and each district was provided with a judge.<sup>2</sup>

In 1889 the Creek Nation enacted a statute which conferred upon each citizen of the Nation, head of a family engaged in grazing live-stock, the right to enclose for that purpose one square mile of the public domain without paying compensation. Enclosure of a greater area was prohibited; but provision was made for establishing, under certain conditions, more extensive pastures near the frontiers to protect against influx of stock from adjoining nations. The conditions prescribed were these: If the district judge should receive notice from citizens of a desire to establish such a pasture, he was required

<sup>1</sup> 248 U. S. 354.

<sup>2</sup> Treaty of June 14, 1866, Art. X, 14 Stat. 785, 788; Report of the Commissioner of Indian Affairs for 1888, p. 113; for 1889, p. 202; for 1890, pp. 89, 90; for 1891, Vol. I, pp. 240-241.

to call a meeting of citizens to consider and act upon the subject; and if it appeared that a majority of the persons of voting age in the neighborhood thus to be protected favored its establishment, the district judge was directed to let such pasture for three years (subject to renewal) to citizens who would by contract bind themselves to build a substantial fence around the pasture, and to pay at least five cents per acre per annum for the grazing privilege.

In 1890 Turner and a partner formed, under the name of Pussy, Tiger & Co., an organization consisting of themselves and one hundred Creeks, with a view to securing such a pasture in the Deep Fork district. They caused an election to be held and a contract to be entered into by the district judge with Pussy, Tiger & Co., which cover about 256,000 acres. The fence required to enclose it was about 80 miles in length. Before its construction was begun, dissatisfaction had already developed in the neighborhood; and from the time the fence was commenced there were rumors of threats by Indians to destroy it if built. The work was, however, undertaken; the threats continued; and Turner and one of his assignees secured from the United States Court in the Indian Territory, First Judicial Division, an injunction restraining the Creek district judge for the Deep Fork district and L. C. Perryman, the Principal Chief of the Nation, from interfering with or damaging the fence. After it had been nearly completed, three bands of Creek Indians destroyed the fence, cutting the wire and posts and scattering the staples. It does not appear that either the Creek judge or the Chief or any other official of the Creek Government had any part in the destruction of the fence, except one Moore, the Treasurer, whose only official duties seem to have been "to receive and receipt for all national funds and to disburse the same, as should be provided for by law."

More than \$10,000 net expended in constructing the fence, and \$2,500 paid by Turner to the 100 Creek Indians associated with him for the release of their grazing rights were lost; and large profits which it was expected would be made through assignment of pasturage rights to cattle raisers were prevented. Claims for compensation were repeatedly presented by Turner to the Creek Nation. Once its National Council voted to make compensation, but Chief Perryman vetoed the action and his veto was sustained. Later the Creek supreme court declared the fence a legal structure, but still the nation failed to make any compensation. On March 4, 1906, the

tribal organization was dissolved pursuant to Act of March 1, 1901, c. 676, Sec. 46, 31 Stat. 861, 872. In 1908 Congress provided, by § 26 of the Act of May 29, 1908, c. 216, 35 Stat. 444, 457, as follows:

That the Court of Claims is hereby authorized to consider and adjudicate and render judgment as law and equity may require in the matter of the claim of Clarence W. Turner, of Muskogee, Oklahoma, against the Creek Nation, for the destruction of personal property and the value of the loss of the pasture of the said Turner, or his assigns, by the action of any of the responsible Creek authorities, or with their cognizance and acquiescence, either party to said cause in the Court of Claims to have the right of appeal to the Supreme Court of the United States.

In August, 1908, Turner, having acquired all the rights of his associates, filed a petition in the Court of Claims against the Creek Nation and the United States as trustee of Creek funds,<sup>1</sup> to recover the amount lost, which he alleged to be the sum of \$105,698.03. The Court of Claims dismissed the petition (51 Ct. Clms. 125), and the case comes here by appeal.

The claimant contends that, by the general law, the Creek Nation is liable in damages for the action of the mob which resulted in the destruction of his property and prevented him from securing the benefits of the contract entered into between him as grantee and the Creek Nation; and that if the substantive right did not already exist, it was created by the act which conferred jurisdiction upon the Court of Claims to hear and adjudicate the controversy.

*First.* No such liability existed by the general law. The Creek Nation was recognized by the United States as a distinct political community, with which it made treaties and which within its own territory administered its internal affairs. Like other governments, municipal as well as state, the Creek Nation was free from liability for injuries to persons or property due to mob violence or failure to keep the peace. Compare *Louisiana v. Mayor of New Orleans*, 109 U. S. 285, 287, 291; *South v. Maryland*, 18 How. 396; *Murdock Grate Co. v. Commonwealth*, 152 Massachusetts, 28, 31. Such liability is frequently imposed by statute upon cities and counties (see *City of*

<sup>1</sup> On November 18, 1915, the sum of \$1,325,167.16 was held by the United States in trust for the Creek Nation of Indians. In addition thereto, approximately \$1,110,000.00 of the tribal funds of the Nation were on deposit in the Oklahoma state and national banks on April 10, 1916, under the provisions of the Act of March 3, 1911, c. 210, § 17, 36 Stat. 1058, 1070.

Chicago v. Pennsylvania Co., 119 Fed. Rep. 497); but neither Congress nor the Creek Nation had dealt with the subject by any legislation prior to 1908. The fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace. And the participation in the injuries of an officer acting, not *colore officii*, but in open and known violation of the law, cannot alter the case. The claimant's contention that the defendant owed to the claimant, as its own grantee, a greater duty than it owed to other persons in the territory, to protect him against mob violence, finds no support in reason or authority.

*Second.* The special Act of May 29, 1908, did not impose any liability upon the Creek Nation. The tribal government had been dissolved. Without authorization from Congress, the Nation could not then have been sued in any court; at least without its consent. The Court of Claims is "authorized to consider and adjudicate and render judgment as law and equity may require." The words of the Act which follow merely identify the claims which the court is authorized to consider. Authority to sue the Creek Nation is implied; but there is nothing in the Act which even tends to indicate a purpose to create a new substantive right. Compare *United States v. Mille Lac Chippewas*, 229 U. S. 498, 500; *Green v. Menominee Tribe*, 233 U. S. 558, 568; *Thompson v. United States*, 246 U. S. 547. The Act simply provides a forum for the adjudication of such rights as Turner may have against the Creek Nation.

*Third.* The United States objected also to the jurisdiction of the court over it. Neither the special Act nor any general statute authorized suit against the United States. As it cannot be sued without its consent, the United States was improperly joined as a party defendant, although in the capacity of trustee for the Creek Nation. Compare *Green v. Menominee Tribe*, *supra*.

It is not necessary to consider the many other objections urged against the petition. The Court of Claims properly dismissed it, and the judgment is

*Affirmed.*



CORDOVA v. GRANT, EXECUTOR OF COTTON<sup>1</sup>*Supreme Court of the United States*

Decided January 13, 1919

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action of trespass to try title to land in Texas lying between the present and former bed of the Rio Grande. The plaintiff (the present defendant in error) alleged that his testator and those under whom the latter claimed had held the land under color of title from the State of Texas for the several statutory periods of limitation, and that the defendant unlawfully entered when the plaintiff had the legal title in possession as devisee. The jurisdiction of the District Court was based upon diversity of citizenship. The defendant pleaded that the plaintiff's title depended upon whether the land was within the United States, and that that depended upon whether the Rio Grande, established as the boundary in 1852, had changed its channel in such a way as to continue to be the boundary or not—the land in question having been upon the Mexican side of the river in 1852 and now being on the side of the United States. The defendant went on to allege that while the United States now exercises a *de facto* jurisdiction over the territory where the land lies, it does so with the admission by treaty and diplomatic correspondence that the boundary is unsettled, and that “the treaties and acts of the respective governments placing said boundary disputes within the jurisdiction of certain special authorities, of which this court must take judicial notice, must necessarily have deprived the courts of each of said republics of jurisdiction,”<sup>2</sup> etc. On this ground it was prayed

<sup>1</sup> 248 U. S. 413.

<sup>2</sup> The facts in the dispute between the United States and Mexico over this tract, known as “El Chamizal,” growing out of the shifting of the bed of the Rio Grande River, the international boundary line between the two countries, are given in an editorial comment in this JOURNAL for October, 1910, page 925. As stated in the editorial referred to, the dispute was referred for decision to the International Boundary Commission between the United States and Mexico, augmented by a Canadian jurist as umpire. The award of the Commission dividing the tract was rendered on June 15, 1911, and is printed in this JOURNAL for July, 1911, page 785. The American Commissioner dissented (*ibid.*, p. 813) and the United States protested against the award.—Ed.

that the court either dismiss the case or stay the trial until the boundary should be established. Subject to this the defendant pleaded not guilty and the ten years statute of limitation of Texas. The plaintiff demurred to the plea to the jurisdiction as showing on its face that the United States and Texas were exercising *de facto* jurisdiction over the land; set up that it was agreed between the United States and Mexico that Mr. Wilbur Keblinger<sup>1</sup> should decide what lands in the disputed territory were proper subjects of litigation in the courts of the United States and of Texas, that he had decided this land to be such, and that his finding had been acquiesced in by both governments. He further alleged that the Government of the United States always had claimed and now claims the land as belonging to the United States, and he denied all the defendant's allegations of fact.

It was agreed that the patents from the State of Texas under which the plaintiff claimed bounded the grants on the Rio Grande, and that if the additions now in controversy had been made by accretion, they belonged to the plaintiff. It also was admitted, and agreed, that the court in deciding upon the demurrer might notice, that the United States, the State of Texas and the County and City of El Paso were then and for many years before exercising government control and political jurisdiction over the property in question and that the United States and State had enforced their laws over the whole of the same. It was agreed further that the court might take notice of the correspondence between the Secretary of State, the Mexican Am-

<sup>1</sup> On March 22, 1910, the United States Government proposed to the Mexican Government a *modus vivendi*, whereby, pending the settlement of the sovereignty of the Chamizal tract by the forthcoming arbitration, proceedings in ejectment cases against persons upon this tract claiming under Mexican titles should be postponed, pending an investigation by an officer of the United States to ascertain the facts of a *prima facie* Mexican title, and of actual possession under such title prior to March 15, 1910. If these facts were shown, the Government of the United States was to present to the court, through the United States Attorney, the diplomatic situation, and to request stay of proceedings, pending the outcome of the international arbitration under the treaty between the United States and Mexico of June 24, 1910. On June 9, 1910, this proposal was accepted by the Mexican Government, and pursuant to the agreement thus reached, Mr. Wilbur Keblinger, American Secretary of the International Boundary Commission, was appointed by the United States as the officer to pass upon the existence of *prima facie* Mexican titles and occupation under such titles.—ED.

bassador and Keblinger, the opinion of the Boundary Commission, and the action of the United States thereon. It appeared from the documents that the United States, while admitting that the boundary line was in question between the two countries, never had admitted any derogation of its *de facto* jurisdiction over the tract; that it had suggested to the Federal courts that as a matter of comity they should not put into execution writs of ejectment, etc., against persons alleging Mexican titles, but that it found it necessary to limit this comity so as to exclude from it persons who had no *prima facie* Mexican titles in order to stop occupation by squatters who were taking advantage of the Government's forbearance. Keblinger was appointed to determine what persons showed a *prima facie* title. He decided against the defendant and with the sanction of the Government informed the plaintiff that the Government would not object if he should proceed.

The District Court sustained the demurrer to the plea to the jurisdiction, and the only color of right to bring the case to this court by direct appeal consists in a suggestion that the construction of a treaty is involved.

The decision of a court that it has jurisdiction on the ground taken by the demurrer simply means that the court finds the Government in fact asserting its authority over the territory and will follow its lead. It does not matter to such a decision that the Government recognizes that a foreign Power is disputing its right and that it is making efforts to settle the dispute. The reference to Keblinger and his finding are important only as showing that there is no present requirement of comity to refrain from exercising the jurisdiction which in any event the courts possess. Jurisdiction is power and matter of fact. The United States has that power and the courts may exercise their portion of it unless prohibited in some constitutional way.

If the passage quoted from the answer is sufficient to open the contention that treaties had contracted for the establishment of a boundary commission with exclusive jurisdiction and so had prohibited the courts from dealing with the question, neither the validity nor the construction of any treaty was drawn in question; or if an attenuated question can be discovered it is no more than formal. A commission sat under the last of the treaties and its action was rejected by the Government as abortive. As the Government had

withdrawn its suggestion of comity so far as the present case is concerned, there was no reason why the court should not proceed to trial, and there is no reason why the present writ should not be dismissed as it was in *Warder v. Loomis*, 197 U. S. 619, and in *Warder v. Cotton*, 207 U. S. 582. It follows that some other questions argued cannot be discussed. *Writ of error dismissed.*

PANAMA RAILROAD COMPANY *v.* BOSSE<sup>1</sup>

*Supreme Court of the United States*

Decided March 3, 1919

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for personal injuries and consequent suffering alleged to have been caused, on July 3, 1916, by the Railroad Company's chauffeur's negligent driving of a motor omnibus at an excessive rate of speed in a crowded thoroughfare in the Canal Zone. The suit was brought in the District Court of the Canal Zone. The defendant, the plaintiff in error, demurred to the declaration generally, and also demurred specifically to that part that claimed damages for pain. The demurrer was overruled and there was a trial, at which, after the evidence was in, the defendant requested the court to direct a verdict in its favor and, failing that, to instruct the jury that the plaintiff could not recover for physical pain. The instructions were refused, the jury found a verdict for the plaintiff and the judgment was affirmed by the Circuit Court of Appeals. 239 Fed. Rep. 303; 152 C. C. A. 291. Followed in *Panama R. R. Co. v. Toppin*, 250 Fed. Rep. 989.

The main question in the case is whether the liability of master for servant familiar to the common law can be applied to this accident arising in the Canal Zone. Subordinate to that is the one already indicated, whether there can be a recovery for physical pain. There is some slight attempt also to argue that the defendant's negligence was not the immediate cause of the injury, but as that depended upon the view that the jury might take of the facts and as there was evidence justifying the verdict, we shall confine ourselves to the two above-mentioned questions of law.

<sup>1</sup> 249 U. S. 41.

By the Act of Congress of April 28, 1904, c. 1758, § 2, 33 Stat. 429, temporary powers of government over the Canal Zone were vested in such persons, and were to be exercised in such manner as the President should direct. An executive order of the President, addressed to the Secretary of War on May 9, 1904, directed that the power of the Isthmian Commission should be exercised under the Secretary's direction. The order contained this passage: "The laws of the land, with which the inhabitants are familiar, and which were in force on February 26, 1904, will continue in force in the Canal Zone . . . until altered or annulled by the said commission;" with power to the Commission to legislate, subject to approval by the Secretary. This was construed to keep in force the Civil Code of the Republic of Panama, which was translated into English and published by the Isthmian Canal Commission in 1905. By the Act of Congress of August 24, 1912, c. 390, § 2, 37 Stat. 560, 561, "All laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide." On these facts it is argued that the defendant's liability is governed by the Civil Code alone as it would be construed in countries where the civil law prevails, and that so construed the code does not sanction the application of the rule *respondeat superior* to the present case.

But there are other facts to be taken into account before a decision can be reached. On December 5, 1912, acting under the authority of the before-mentioned Act of August 24, 1912, § 3, the President declared all the land within the limits of the Canal Zone to be necessary for the construction, etc., of the Panama Canal and directed the Chairman of the Isthmian Commission to take possession of it, with provisions for the extinguishment of all adverse claims and titles. It is admitted by the plaintiff in error that the Canal Zone at the present time is peopled only by the employees of the Canal, the Panama Railroad, and the steamship lines and oil companies permitted to do business in the Zone under license. If it be true that the Civil Code would have been construed to exclude the defendant's liability in the present case if the Zone had remained within the jurisdiction of Colombia, it does not follow that the liability is no greater as things stand now. The President's order continuing the

law then in force was merely the embodiment of the rule that a change of sovereignty does not put an end to existing private law, and the ratification of that order by the Act of August 24, 1912, no more fastened upon the Zone a specific interpretation of the former Civil Code than does a statute adopting the common law fasten upon a territory a specific doctrine of the English courts. *Wear v. Kansas*, 245 U. S. 154, 157. Probably the general ratification did no more than to supply any power that by accident might have been wanting. *Honolulu Rapid Transit & Land Co. v. Wilder*, 211 U. S. 137, 142. In the matter of personal relations and duties of the kind now before us the supposed interpretation would not be a law with which the present "inhabitants are familiar," in the language of the President's order, but on the contrary an exotic imposition of a rule opposed to the common understanding of men. For whatever may be thought of the unqualified principle that a master must answer for the torts of his servant committed within the scope of his employment, probably there are few rules of the common law so familiar to all, educated and uneducated alike.

As early as 1910 the Supreme Court of the Canal Zone announced that it would look to the common law in the construction of the Colombia statutes, *Kung Ching Chong v. Wing Chong*, 2 Canal Zone Sup. Ct. Rep. 25, 30; and following that announcement, in January, 1913, held that "at least so far as the impresarios of railroads are concerned" the liability of master for servant would be maintained in the Zone to the same extent as recognized by the common law. *Fitzpatrick v. Panama R. R. Co.*, id., 111, 121, 128. The principle certainly was not overthrown by the Act of 1912. It is not necessary to dwell upon the drift toward the common-law doctrine noticeable in some civil-law jurisdictions at least, or to consider how far we should go if the language of the Civil Code were not clearer than it is. It is enough that the language is not necessarily inconsistent with the common-law rule. By Art. 2341, in the before-mentioned translation, "He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, without prejudice to the principal penalty which the law imposes . . ." By Art. 2347, "Every person is liable not only for his own acts for the purpose of the indemnity of damage, but also for the acts of those who may be under his care," illustrating by the cases of father, tutor, husband, etc. By Art. 2349, "Masters shall be responsible for the damage

caused by their domestics or servants, on the occasion of a service rendered by the latter to the former; but they shall not be responsible if it be proved or appear that on such occasion the domestics or servants conducted themselves in an improper manner, which the masters had no means to foresee or prevent by the employment of ordinary care and the competent authority; in such case all responsibility for the damage shall fall upon said domestics or servants." The qualification in this last article may be taken to refer to acts outside the scope of the employment. It can not refer to all torts, for that would empty the first part of meaning. A master must be taken to foresee that sooner or later a servant driving a motor will be likely to have a collision, which a jury may hold to have been due to his negligence, whatever care has been used in the employment of the man.

We are satisfied that it would be a sacrifice of substance to form if we should reverse a decision, the principle of which has been accepted by all the judges accustomed to deal with the locality, in deference to the possibility that a different interpretation might have been reached if the Civil Code had continued to regulate a native population and to be construed by native courts. It may be that they would not have distinguished between a negligent act done in the performance of the master's business and a malicious one in which the servant went outside of the scope of that for which he was employed. But we are by no means sure that they would not have decided as we decide. At all events, we are of opinion that the ruling was correct. As we do not rely for our conclusion upon a Colombia act specially concerning the impresarios of railroads, we do not discuss a suggestion, made only, it is said, to show that the act is inapplicable, to the effect that the charter of the Railroad Company did not grant the power to operate the omnibus line. The company was acting under the authority and direction of General Goethals and we do not understand that the defense of *ultra vires* is set up or could prevail.

In view of our conclusion upon the main point but little need be said with regard to allowing pain to be considered in fixing the damages. It cannot be said with certainty that the Supreme Court of the Zone was wrong in holding that under the Civil Code damages ought to be allowed for physical pain. *Fitzpatrick v. Panama R. R. Co.*, 2 Canal Zone Sup. Ct. Rep. 111, 129, 130; *McKenzie v. McClintic-*

Marshall Construction Co., *id.*, 181, 182. Physical pain being a substantial and appreciable part of the wrong done, allowed for in the customary compensation which the people of the Zone have been awarded in their native courts, it properly was allowed here.

*Judgment affirmed.*



## BOOK REVIEWS

*Impressions of the Kaiser.* By David Jayne Hill. New York: Harper and Brothers. \$2.00, pp. 367.

IF the scope of this work were not wider than the title would seem to indicate, it might not be appropriate for review in a journal of international law. It is not, however, a mere series of personal anecdotes of William of Hohenzollern or of his entourage. It is, on the other hand, a broad, studious and comprehensive examination of the international ambition, practice and policy of Germany for two generations and of the predominant influence of the Kaiser in creating that ambition and establishing and carrying out that practice and policy during the past thirty years.

Mr. Hill's preparation for this task is obvious. His vigorous and industrious life has been spent in political and historical studies, or in the diplomatic service, or in the Department of State of the United States. He has served as Assistant Secretary of State of the United States, when that office was next to the Secretary and often made him Acting Secretary, as Minister to Switzerland and the Netherlands and Ambassador to Germany, and as one of the delegates to the Second Hague Peace Conference. He is the author of many valued works on many subjects, but especially, during the past twenty-five years, he has dealt copiously with international history and relations and diplomacy.

The present volume covers 367 pages and is divided into ten chapters whose titles indicate its range. They are: "The Sources of the Kaiser's Power," "The Kaiser's Methods of Personal Control," "The Kaiser as a Stage Manager," "The Kaiser under Fire," "The Kaiser's Reversion to Type," "The Kaiser and His People," "The Kaiser's Attitude toward War and Peace," "The Kaiser's Efforts for British Neutrality," "The Kaiser's Double Diplomacy," "The Kaiser's Responsibility for the War."

Dr. Hill in his preface says that it is "not merely with William II as a personality that we are here concerned, but with the whole process of seduction by which as German Emperor he has led the German people, at first distrustful of his purposes, to render them-

selves subservient to the Prussian conception of the State and the ambition of the Hohenzollern dynasty. Under his tuition and guidance, from motives which he has been able to excite and call into action, they have built up a war machine of perilous potency without providing means for its rational control. They have rendered the State omnipotent and irresponsible, and have placed its powers at the disposal of a single will that holds itself without accountability to men." This is a powerful statement of the origin and result of so-called Prussianism and may well serve as a warning to any nation which finds itself subject to the beginning of such dominance and feels the pressure of such an egotistical and absolute will.

Dr. Hill says that "actual government always consists more in a spirit than in a form;" that "a ruler nominally absolute may listen to the voice of his people, while the head of a democracy may exercise and display the qualities of a Cæsar." He points out that strong central control, essential for Germany and "the character of the Prussian monarchy, opened a path toward absolutism;" that the German Constitution presents a "façade of liberalism but conceals the absolute authority conferred upon the King of Prussia under the most plausible camouflage;" that this was devised by Bismarck to make himself, as Imperial Chancellor, omnipotent under a merely titular head; that the young Kaiser, impressed by the victors returned from France, started his reign by claiming as his heritage "the absolute and indestructible fidelity of the Army," he regarding it as a "dynastic possession."

Mr. Hill shows that "although, in other respects not much approved of, America was the model upon which the Kaiser built his plans of material prosperity and the great movements that quickened the economic life of the Empire were initiated by men who took the pains, first of all, to learn the lessons of America. The sympathy between the two countries at that time was intense and sincere;" that "William II thought that German territory should increase with the German population in order that as few Germans as possible should cease to be his subjects;" that he urged that in foreign lands Teutons must be missionaries "for German culture and German trade," having their own schools and churches to keep the "maternal language" alive; that "no other monarch in the world insisted that personal fealty to himself must be carried into foreign lands;" that by control of the sources of power and advancement, by denying

everything to liberal and according everything to servile writers and scholars, he brought the universities under his influence and made them no longer seats of freedom but essential parts of his dynastic propaganda.

Even the great Treitschke was threatened in his later years "with having the archives closed to him" because he had ventured to unfavorably though indefinitely, portray the foibles of the Sovereign, and timely death alone saved the old man from further humiliation; that Quidde, the Munich professor, who wrote "Caligula," which was recognized as a blasting satire upon William, was charged with *lèse Majesté*: "Whom have you in mind in writing this article?" demanded the cross-examiner. "Caligula, of course," was the prompt reply, "Whom have you in mind, Mr. Solicitor?" The government was baffled and the prosecution dropped.

Mr. Hill says that knowing personally many of the ninety-three distinguished Germans who signed the manifesto of university professors justifying the violation of Belgian territory, he cannot believe that mere vulgar fear of the consequences of refusal actuated them. "This act," he says, "was the fruit of twenty-five years of subserviency so habitual that they solemnly proclaimed a falsehood because they had been accustomed to think that whatever the Emperor ordered could not be wrong." He says the Kaiser saw no value in an independent public opinion, a state of mind which by some strange infection seems now for the first time observable in the public life of other nations.

He points out that no one ever interfered with peaceful German commerce, to which all ports were open and for which all waters were safe, yet the Kaiser expanded his navy to carry his militarism beyond the frontiers of Germany and to dominate the sea, seeking to make it a German lake as his fathers had made the Rhine a German river. Mr. Hill says of the Kaiser on his histrionic side: "Beneath the flowing robe of the peace-maker the protruding scabbard of the sword has always trailed across the stage." He points out that at various times the Kaiser earnestly desired peace with other nations, as with England and the United States, but this was merely such neutrality as would leave him to destroy or devour other nations which were the proximate objects of his enmity or his greed; that he expected the great number of persons of German blood in America to determine her course in that way.

Mr. Hill tells of his first presentation to the Emperor. He found him waiting in the palace garden, clad in white with a silver helmet on his head, looking like Lohengrin, and records his personal charm, but found "a mind distorted, led into captivity and condemned to crime by the obsession that God has but one people and they are his people; that the people have but one will and that is his will; that God has but one purpose and that is his purpose; and, being responsible only to the God of his imagination, a purely tribal divinity, the reflection of his own power-loving nature, that he has no definite responsibility to men." He shows that, he being subject to this obsession, no restraints were possible upon the Kaiser and no promises binding. Under pretense of danger to the fatherland he increased armament by sea and land, when the only danger to the peace of Europe rose from the trespasses and machinations of Germany and its dependent ally, Austria-Hungary.

He examines the claim of divine appointment made by the Kaiser, and shows the vassalage, negotiations and vicissitudes through which the Hohenzollerns advanced to the throne. He shows that no moral principle but success alone was the Kaiser's test of divine intention, "and so the Hohenzollern prerogatives, which obtain but little comfort from science, seek their safe asylum in the mysteries of religion."

He says:

In no country of Europe has the feudal system continued to affect the social organization to the extent it has in Germany. When the French were proclaiming the "Rights of Man" as axioms of the human mind, German princes were selling their subjects as foreign mercenaries in the same spirit as they would enter upon a transaction for the shipment of cattle; and there was no suggestion of revolt.

He shows that German philosophy, from Hegel down, has represented the State as a superior entity for whose aggrandizement the individual exists; that all society is modeled on the army, "a system of super-imposed classes," every one tenacious of his title, petty or otherwise; that under this system the higher may with impunity neglect or abuse the lower, but that any inattention to a superior is held to deserve punishment. There was no craving for individual liberty in the English or American sense, and "freedom meant only exemption from want and misery." That the Kaiser in his personal addresses never refers to the prescriptions of international law or to principles of any kind, but speaks on great questions like a primitive

oriental despot. "*Sic volo, sic jubeo*" seemed his motto, but a decision once made he regarded thereafter as the act of God.

He points out that in the negotiations between Germany with England, through Lord Haldane, in 1912, the former proposed absolute neutrality for each country in case the other was at war with a third; but the purpose of this was not peace, but aggressive war, the very war that has followed, with England with her hands tied. Fortunately the negotiations were not successful. Bernhardt wrote that if England consented to the expansion of Germany and Austria as both European and colonial Powers and in military and naval equipment, "European peace would be assured and a powerful counterpoise would be created to the growing influence of the United States." Perhaps to cover these machinations, Fried published his book "The German Emperor and the World Peace," in which the Kaiser was posed as the most pacific of rulers.

Dr. Hill says that the Kaiser offers no defense of his procedure in bringing on the most bloody and destructive war of all history, except to complain that Great Britain complicated his plans by not observing the neutrality he had desired, but which England had not pledged herself to, and which would have meant the destruction of her allies as a preliminary to her own humiliation. When on July 26, 1914, Sir Edward Grey, alarmed at the prospect of a war engulfing all Europe, proposed a conference to prevent it, the German Government refused to "fall in with" the suggestion and deemed it "not practicable." To cause England to desist in her rôle of peace-maker, on the 29th the German Ambassador informed Sir Edward that the German Chancellor would mediate between Vienna and St. Petersburg, and the Kaiser promised his good offices to the Czar. The Kaiser, in his message to President Wilson, represents that on the morning of July 31st, while preparing a note to the Czar to inform him that Vienna, London and Berlin were agreed, he was interrupted by a telephone message from his Chancellor saying that on the night before the Czar had ordered the whole Russian army mobilized. Mr. Hill shows that this information was actually received not in the morning, but the evening of July 31st, and the Russian mobilization was not ordered until the afternoon of that day. So that on the evening of the 31st, when the Kaiser had a modified consent from Vienna to comply with Sir Edward's suggestion and from the Czar suggesting arbitration at The Hague, an alternative was telegraphed St. Petersburg that if Russia

did not stop all war measures within twelve hours, German mobilization would follow. The threat was of mobilization, not war, but the German Ambassador at St. Petersburg was instructed, if no satisfactory reply were received, to declare war at five p. m., August 1, and at 7.10 p. m. that day it was declared. Speaking, June 8, 1918, on the thirtieth anniversary of his accession, the Kaiser said that while his people did not know at first what the war meant, that he knew very well that it was a world struggle between the Prussian-German-Germanic world conception and the Anglo-Saxon conception.

Dr. Hill finds the outcome was but "the morally inevitable culmination of the ambitions, the fantasies and the impetuosity of Kaiser William II, unrestrained by a responsible government."

"He promised them gain and glory. He has covered them with sackcloth and ashes," says Dr. Hill. He finds the claim of "Encirclement" made by Germany wholly unreal, either in a military or a commercial sense, German ships on every sea, their goods in every market and Great Britain their best customer. He finds the secret of the Kaiser's course merely in a dynastic ambition that all Germans should continue his taxpayers, his soldiers, his subjects. "Therefore, other peoples must be annexed to the German Empire in order that Germans may remain German subjects."

That the whole was merely a predatory adventure, in the spoils of which only a few participated; that the people as a whole do not profit by it; that the Kaiser did not will *this* war, but a swift, short victorious war which should secure large indemnities, add coveted territories and make Germany master on the continent, preparatory to another like war for supremacy at sea; that Germany fought what she called a defensive war "on the soil of ten other nations."

Dr. Hill sustains his conclusions by full and exact references to official documents and the most accepted of German writers. He adds at the close some thirty-five pages of illustrative documents, and an index of six pages closes the book.

This writer has found these Impressions intensely interesting, an impressive and convincing work, informed by earnest feeling and shaped by not only the most careful scholarship, but by the author's personal acquaintance with Germany and her leaders.

Any reader must hope that by some happy circumstance the country may be able to avail itself of Dr. Hill's erudition, experience, justice and sound common sense in the settlement of its international re-

lations now so vastly complicated and important. His equipment for such a task is obvious and preëminent and his vigor and zeal unabated. There is no more serious impeachment of party government than that it excludes such a citizen from the service of his country, in a time of need, in helping to solve questions as to which he is perhaps the best informed American.

CHARLES NOBLE GREGORY.

*The Economic Causes of War.* By Achille Loria, of the University of Turin. Translated by John Leslie Garner. Chicago: Charles H. Kerr & Company. 1918. pp. 138.

This work is a *multum in parvo* of historical erudition and economic insight. Its eminent author has put into one hundred and eighty-two pages a philosophy of war and peace based on history and the overwhelming object lesson of the present war. As he tells us, the occasions for international quarrels multiply with the relations which civilization creates and, as a part of this evolution, international law develops, treaties multiply and the incentives for disregarding both law and treaties increase in like proportion till wars result. All this is largely under the pressure of economic motives. Foreign trade has been one dominant factor from primitive times to the present day. It is both a source of wealth and a breeder of wars. Professor Loria distinguishes sources of wealth as "physiological" and "pathological"—the former being in evidence where wealth is acquired by production and the latter where it is gained by some form of "grab," simple or complex. As population grows, the seizure of land becomes a prominent means of acquiring—and losing—wealth, though, as the author thinks, it may have been a less prominent one in actual history than it has been made to be in traditional assumptions. Opportunity for traffic has more often figured as the bone of contention.

Professor Loria shows by examples that while international laws increase with material civilization, the motives for disregarding them grow also, and there is a perpetual struggle between that which restrains from war and that which provokes it, and that wars are, ever and anon, occurring as the latter influences become the stronger. Commerce and the resulting motives for war, necessity for law, violations of law, warfare—such is the series perpetually illustrated in the history of any long period.

Science doubtless gains by reason of the fact that advocates of an important principle often run to over-statement, especially during

the period when the principle is making its way toward general recognition, and the value of the present little work is not lessened by such statements as the following:

The Crusaders' *sole* motive was the increase of revenues of feudal lords at the expense of the revenues of Syrian and oriental lords;

The change in military art which took place in the early modern period was *caused* by the decline of the power of the feudal element as compared with that of the bourgeoisie;

Holland's struggle for independence against Spain was in reality simply a privateering war on the Spanish merchant marine and the Hispaño-American colonial trade. The war of England against Napoleon was *merely* a reaction against the Napoleonic conquests which threatened Britain's commerce;

The Chinese war was undertaken to impede the progress of the United States. The Spanish war was merely the result of the decline in the profits of the American sugar manufacturers. The war in the Transvaal was the work of financiers and speculators in gold mines, who expected to reap great profits from a military adventure in South Africa, etc.<sup>1</sup>

In general, the work gives too much color to the belief that in modern times wars are frequently, if not generally, brought about by financial interests and, rather than otherwise, against the will of governments and peoples.

A passage in the work throws light on the basis of the so-called "Balance of Power"—a subject which in current discussion is seldom treated with much intelligence. Even in the small compass of this volume there is enough to show that the comparative fighting strength of different nations or groups of nations is necessarily an element affecting the probability of maintaining peace. Among the merits of the work is to be counted its treatment of the relation between labor movements and warfare and its discussion both of the analogy and the marked difference between arbitration of labor disputes and arbitration of international quarrels. Labor movements, which play so conspicuous a part in all modern life, have much to do with international relations, and a democracy which connects itself in spirit and in practice with labor movements is, in the main, a discourager of warfare. These principles are presented clearly and have as much illustration as the size of the work permits.

JOHN BATES CLARK.

<sup>1</sup> Page 60 *et seq.* The italics are mine.



*The Great European Treaties of the Nineteenth Century.* Edited by Sir Augustus Oakes, C. B., lately of the Foreign Office, and B. B. Mowat, M.A., Fellow and Assistant Tutor of Corpus Christi College, Oxford; with an Introduction by Sir H. Earle Richards, K.C.S.I., K.C., B.C.L., M.A., Fellow of All Souls College and Chichele Professor of International Law and Diplomacy in the University of Oxford, Associate of the Institute of International Law. Oxford: at the Clarendon Press. 1918, pp. xii, 403. \$3.40

This book may be described as a Hertslet in miniature—no small praise, indeed, for the monumental *Map of Europe by Treaty* is the indispensable starting-point for all who seek to know of the territorial changes in Europe during the past century. The authors give the texts of the principal political treaties, beginning with that of Vienna, to that of Bucharest, more than a score in all, nearly all of them as given by Hertslet. Documents other than treaties are also given, e. g., the Constitution of the German Empire and the Anglo-Belgian military conversations of 1906. The treaties and conventions are arranged under the following topics: "The Restoration of Europe," "The Independence of Greece," "The Kingdom of Belgium, Turkey and the Powers of Europe," "The Danish Duchies," "The Union of Italy, Austria and Prussia," "The Grand Duchy of Luxemburg," "The Franco-Prussian War," "Turkey, Russia and the Balkan States," and "The Triple Alliance." In an appendix appears "The Treaty of San Stefano." It will thus be observed that the purely law-making treaties have been omitted. Under each topic is a succinct, careful, and uniformly temperate account of the diplomacy leading up to and following each treaty. Prefixed to the whole is an excellent chapter on the conclusion of treaties.

The atmosphere of the book is throughout one of dependability. The proof has been carefully read and few errors are observable. The date of the founding of Odessa is given once (p. 102) as 1790, and again (p. 164) as 1794, the latter being correct. To state baldly that Luxemburg is bound by the Salic law (without noting the exception provided by the Nassau family arrangement of 1783) is confusing to the casual reader, who might find it difficult to account for the tenure of the present and previous grand duchesses. To say (p. 247) that "Saxony, Bavaria, Wurtemberg, Baden, and Hesse-Cassel threw in their lot with Austria" in 1866 is, of course, literally correct, especially in view of King George's protestations of neutrality, but the

statement leaves one in the dark as to Hanover and Nassau, titles to which Prussia successfully maintained as founded upon conquest. The narrative might also have been made more clear as to the attitude of Great Britain upon the question of the Danish Duchies following Earl Russell's circular of 1865, to the effect that by the Convention of Gastein "the dominion of Force is the sole power acknowledged and regarded." Russell's earlier *fortiter in modo* and *suaviter in re* toward Russia no doubt led Bismarck rightly to believe that Great Britain would not actively interfere against the schemes of Prussia by which were laid the foundations of German sea-power.

Considering the compression and self-restraint of the narrative and the generally excellent choice of treaties presented, one will hardly cavil at omissions, but surely the book would not have been unduly extended had it included the Treaty of Lausanne of 1912. To have clauses III, IV, and VII of the Triple Alliance Treaty as renewed in 1903 (the text appeared in the London *Times* for June 1, 1915) is, however, some compensation. There are ten full-page maps to illustrate the text.

In his introduction, Professor Richards elaborates the general proposition that treaties are terminated by war. The exceptions, however, are so numerous that the statement of the so-called general rule avails little. Many will share with Professor Richards his dislike of the terms *transitory* and *dispositive* as applied to treaties, yet not all lawyers will agree that the suggested substitute (*executed* treaties) is quite synonymous with the former adjectives.

The aim of the authors "to present an historical summary of the international position at the time of each treaty; to state the points at issue and the contentions of the parties, and so to make readily accessible the materials on which international lawyers have to work," has been successfully achieved notwithstanding the limitations of space. The result is an extremely useful and reliable book.

J. S. REEVES

*The Question of the Bosphorus and Dardanelles.* By Coleman Philipson and Noel Buxton. London: Stevens & Haynes. 1917, pp. 264. 12/6.

World politics is fast becoming a fascinating study to every wide-awake man of today. Questions of which he had never heard and places which formerly seemed as remote as the moon, are now the daily

topics of his conversation. He has an opinion on every important issue of the day; and his influence is being felt in the councils of state. Among the vital issues raised by the Great War, few are more important or more far-reaching in their effects than that vexatious problem known as the "Near Eastern Question." The present work by Dr. Phillipson and Mr. Buxton is a detailed study of one phase of this intricate problem, which the authors designate as "the very essence of the Near Eastern Question." Their object is "to set forth, as briefly and as clearly as possible, the rise, development, and vicissitudes of this problem—to analyze it into its constituent elements; to show the efforts that have been made in the past to solve it; to expound and critically examine from the point of view of international law the régimes that have been established by conventions; and, finally, to suggest what appears to be in the present state of affairs the most desirable solution." They have kept strictly to their program, and have discussed the question almost entirely from the legal standpoint.

The work is divided into three parts, the first of which has two chapters, one on the "Problems of the Bosphorus and the Dardanelles" and the other describing in detail the "Position of Waterways in General under International Law." Part two gives the history of the evolution of the Rule of the Straits from the beginning of the eighteenth century to the Treaty of Berlin in 1878, with an account of the various conventions affecting the question of the Straits and a chapter on the "Interpretation and Application of the Rule of the Straits" in the nineteenth and twentieth centuries. The third part, entitled "Reconstruction," contains an account of the efforts of Russia in the nineteenth century to modify the Rule of the Straits, together with a summary of the attitude of the Powers, the various schemes for reconstruction proposed, and the development of opinion on this problem both in Russia and in Europe down to the early part of the Great War. And its last chapter is devoted to what the authors regard as the best solution of this remarkable problem.

The authors are well qualified to handle this topic in a masterly manner. Dr. Phillipson is a recognized authority on international law, having written two valuable treatises on "International Law and the Great War" and "The Termination of War and Treaties of Peace." While Mr. Buxton, as an author and traveler, is thoroughly familiar with the Near East and its problems. They have given us an excellent treatise which embraces within one volume all the salient

facts concerning the question of the Straits. It will be a useful book for the student, the jurist, and the intelligent general reader. It is well written in an easy style and impartial spirit. The facts are presented in a clear, concise manner; and every phase of the problem under discussion is skilfully handled without bias. Everyone who wishes to be well informed on this question without an endless amount of study, will do well to possess a copy of this work. But it is not a popular book, or a volume for holiday reading. On the other hand, one must not expect to find in it any exhaustive study of conditions in the Turkish Empire, or of other problems of the Near East. It tells merely what it claims to relate: the story of the Straits of the Bosphorus and Dardanelles. And the narrative is simple, direct and complete, without being brilliant. Nor does it add anything new to our knowledge concerning the situation at the Straits.

The authors were wise, undoubtedly, in avoiding extended discussions of the political and diplomatic controversies over this question. Yet one feels, in perusing the volume, that it would have been improved and its value for the general reader considerably enhanced, if the writers had explained in detail just why Great Britain, Austria and Germany persisted for years in the maintenance of their "traditional policies" concerning the Straits and Turkey, and had called attention to the relationship between the question of the Straits and the other vital problems of the Near East. And, even though the authors admit that "no other question in the recorded history of the world has given rise to so much tortuous diplomacy, to so much international jealousy and friction, to so much sinister rivalry, and to so many bitter wars," they fail to bring home to the culprits in a forceful and spirited manner the blame for the great losses and sufferings caused by their actions and policy in regard to the problem of the Straits. No language is strong enough to express adequately the condemnation of the world for the sins of commission and omission perpetrated by European diplomatists and statesmen, which entailed so much trouble and disaster to Europe, and brought down upon the heads of so many hapless and innocent people such terrible persecution and suffering.

A great deal of space is devoted to the attempts of Russia to solve the question of the Straits; and one is given the impression that her statesmen should be censured for attempting to settle the problem in accord with Russian ambitions. Like the governments of all states,

the Russian régime was undoubtedly influenced in its actions largely by selfish motives. Yet one must give it credit for attempting honestly, on more than one occasion, to really solve the question of the Straits. This is more than can be said of any other great Power. Great Britain cannot be excused for not meeting Russia half way on these propositions, even though the authors claim that "we may justifiably flatter ourselves in believing that if diplomacy and the proceedings of every state had been no worse than our own (the British), the present convulsion in the world would not have taken place." It is not what they did, but what they did *not* do that matters in this instance. The British sins of omission were as great as the sins of commission committed by other Powers. And it is a great pity that their stubbornness and shortsightedness (which Mr. Buxton criticises in his earlier writings) prevented them from seeing for a half century, what they saw so clearly in 1914. This was that their own, as well as Europe's best interests, demanded the prompt solution of the question of the Straits, and that any solution was preferable to no solution.

The authors make a careful distinction between the neutralization and the internationalization of the Straits, and advocate the internationalization of the Bosphorus and the Dardanelles and their control by an international commission, similar to the Danube and Suez Commissions—the fortifications to be dismantled and the Straits to be kept open to the ships of all nations. Constantinople should be made a free city under the joint protection of all the Powers, including the United States. If the book had been written within the past six months, the authors might have suggested the protection of the League of Nations instead. This is probably the best solution possible at this time, unless one accepts the suggestion of Sir Edwin Pears that the Straits be opened to the ships of all states, that the whole region, with Constantinople as a center, be made a small independent state, and that it be governed by an international commission. This scheme has certain advantages of simplicity over the other. But, in any event, this question must be solved in conformity with international law and in the manner that shall best serve the general welfare and promote the interests of all nations.

NORMAN DWIGHT HARRIS.

*The Legal Obligations arising out of Treaty Relations between China and Other States.* By M. T. Z. Tyau, LL.D. Shanghai: The Commercial Press, Ltd. 1917, pp. xxii and 304.

This work, first prepared as a thesis for the University of London and subsequently revised and enlarged, is the result of a very painstaking, comparative study of China's treaties with other Powers from the earliest, that of 1689 with Russia, down to and including those wrung unwillingly from China by Japan in May, 1915, following the presentation of the Twenty-One Demands. It is not a collection of treaties, such as we find in Hertslet's volumes, but rather an examination of the characteristic provisions of the treaties as illustrating the attitude of other nations toward China and the encroachments made by them upon China's sovereignty.

Sir John Macdonell, Professor of Comparative Law in the University of London, writes a Prefatory Note in which he makes this just observation:

It is significant that almost all the treaties concluded for some years with China and indeed, until recently, belong to the class known to jurists as *iniquum fœdus*, the imposed treaty: they are not spontaneous agreements freely entered into by the parties: some of them rather are of the nature of what Roman jurists termed *deditio*. The narrative tells of the granting of large rights to foreigners in derogation of Chinese sovereignty. I would not seek to make the author of this volume responsible for any of these prefatory words; but in my view it is the duty and the interest of Western States to do all that they can to preserve the integrity of China in the letter and spirit, to strengthen her Government and, as quickly as possible, to undo all that has been done to weaken her.

Dr. Tyau gives a brief history of Chinese treaty relations, and reminds us of a truth, which some of us are likely to forget, that "up to the sixteenth century China consistently encouraged foreign intercourse: it was only when the newcomers had committed flagrant excesses against Chinese rights and property that it was compelled in self-defense to close its portals."

Remembering that Japan's exclusion of foreigners was due to a similar cause, it is interesting today to find the situation somewhat reversed and Western nations erecting Chinese walls of legislation to exclude the Oriental.

The author for his purpose divides the treaties into three classes:  
Those of a political character,  
Those of an economic character, and  
Those of a general character.

Among the interesting topics discussed under the first head is that of Extraterritoriality. In the earliest treaty with a foreign Power, that of 1689 with Russia, provision is made for the trial of offenders by their own officials, but not on foreign soil. Russians guilty of offenses in China were arrested by the Chinese and sent over the frontier to be tried by Russian judges, and Chinese offending in Russia were reciprocally sent back to China to be tried and punished. The arrangement was mutual: the two governments were exactly on an equality.

Another fact worthy of note is that Japan did not enjoy extraterritorial rights in China until after the war of 1894-95. And even now Korean subjects of Japan residing in the Chientao district on the Chinese side of the boundary and engaged in agriculture are amenable to Chinese jurisdiction.

There is a common impression abroad that the acknowledgment of the extraterritorial jurisdiction of foreign states in China was not looked upon by the Chinese as a loss of prestige, that China had always considered sovereignty as personal, not territorial. This is a mistake. The instance cited of the punishment of Arab traders in Canton by their own headmen is in fact an evidence of the contrary. The foreigners were tried by Chinese judges, but delivered to their headmen to be punished. These headmen did not represent any foreign government and it was a Chinese sentence that was executed.

In the chapter on "Leased Territories," Dr. Tyau discusses, in a very interesting manner, the status of the territory of Kiaochou, formerly leased to Germany and seized by Japan in the recent war. Dr. Tyau argues that since the lessee is not the sovereign of the territory, the latter enjoys a quasi-neutrality and can not legitimately be an object of attack or capture by an enemy of the lessee.

There are very valuable chapters on "Spheres of Influence," "Treaty Ports," "Tariffs," "Extradition" and the operation of the "Favored Nation" clause.

The concluding chapter is a plea for treaty revision.

If at times Dr. Tyau seems to hold a brief for his own country, as is quite natural, it must be admitted nevertheless that on the whole he writes in a calm, dispassionate manner and withal very convincingly. The work is one which ought to have a place in the library of every student of Far Eastern Affairs.

E. T. WILLIAMS.

*China's New Constitution and International Problems.* By M. T. Z. Tyau, LL.D. Shanghai: The Commercial Press, Ltd. 1918, pp. xv and 286.

Both this work and the preceding do credit to Chinese scholarship and to the bookmaking skill of the Commercial Press.

The first part of the work is devoted to a history to date of constitution-making in China, and to a careful study of the unfinished draft of the new constitution. This was on the point of adoption when a crisis in the government led to a forced dissolution of Parliament, followed by Chang Hsun's abortive attempt to restore the monarchy: thus the Constitution was left incomplete.

Dr. Tyau began his publication in a series of articles in the *China Press* and *Peking Gazette* before the crisis occurred, expecting a speedy adoption of the Constitution by Parliament. While that expectation was disappointed, he has done well nevertheless to publish these chapters in book form, for it will be most valuable to the next Constitution Committee, and in all probability the Constitution to be adopted will be similar to this, if not identical with it.

Article by article and clause by clause the document is carefully reviewed and a comparison is made with the provisions of other constitutions, notably those of the United States, Brazil, Chile, France and Canada.

The Chinese Committee made a careful study of these and of other constitutions, yet, as Dr. Tyau points out, the Constitution drawn up is not American, nor French, neither British nor Chilean: it is essentially Chinese.

Dr. Tyau finds the beginnings of the Chinese Constitution in the Chinese Classics which, while they did not in formulated articles define the relations of ruler and ruled, nevertheless taught the truth that the welfare of the people is the true object of government, and upheld the right of revolution for the overthrow of tyranny, making the will of the people the supreme law. He might even have gone further, for aside from the teachings of the Classics, the Chinese have preserved almost unchanged ancient local institutions which embody the very spirit of self-government.

It is scarcely worth while to discuss the provisions of a constitution which has not yet been adopted, but there are two or three features nevertheless that may well be mentioned, since they will probably be



embodied in any constitution likely to be adopted by the Republic of China.

Both in the existing and in the proposed new constitution the suffrage is limited to male citizens of at least twenty-one years of age, possessed either of certain property qualifications or of a certain degree of education. The amount of property required is not large. If one pays but \$2 a year in direct taxation he is qualified to vote.

There is, however, one remarkable exception—monks, priests and other religious orders are disfranchised.

Another feature of the new and the old constitution is the provision for the representation of Chinese citizens living abroad. Six such representatives sit in the Senate. Their election, however, takes place in Peking. Each chamber of commerce of Chinese residing abroad sends one representative to Peking to form an electoral college, which chooses the six senators.

The President, as is the case in France, is elected by the two houses of Parliament sitting in joint session.

China follows France, too, in having not only a President, but a Premier.

The latter is appointed by the President, but must be confirmed by the lower house, and to the lower house the Premier is responsible. Should the House of Representatives pass a vote of lack of confidence, either the Premier must be dismissed or the President must dissolve the House of Representatives and order a new election.

The chapter on Provincial Government had not been adopted in Committee, but the plan most likely to be decided upon provides for a strongly centralized national government. Each province has its legislature, but the Central Government reserves all powers not expressly granted to the provinces. Peking was to appoint the Governor of each province and the Governor to appoint the magistrate of each district or country. The county or district was to be the local unit. The district magistrates were to be selected from a list of men who had passed the civil service examination, but not more than one-half were to be citizens of the province, and no man could serve in his own district.

This was evidently a compromise between the old system of the Manchus, which did not allow a man to serve in his own province, and the plan of those who, since the revolution, have struggled to

establish strong provincial governments, all but independent of Peking.

The remainder of this volume is devoted to the discussion of a variety of questions, among them the tripartite treaty between Russia, China and Outer Mongolia, which has already been noticed in this JOURNAL.<sup>1</sup>

E. T. WILLIAMS.

*International Rivers.* By G. Kaeckenbeeck. London: Sweet & Maxwell. 1918, pp. xxvi, 255. With separate maps.

*Die Internationalisierung der Meerengen und Kanäle.* By Rudolf Laun. The Hague: Martinus Nijhoff. 1918, pp. viii, 172.

The problems involved in the subjects to which these monographs are devoted are analogous and fall within the scope of the commission of the Peace Conference dealing with the international régime of ports, waterways and railways.

The book on International Rivers is published under the auspices of the Grotius Society. Its author is a young Belgian who came to England after the outbreak of the war and continued his law studies at Oxford, graduating with great distinction. As the book itself evidences, he has become a master of English style.

In the first part, the author endeavors to present briefly the early doctrines relating to international rivers. Manifestly no beginnings are to be found in the Roman sources, but the philosophy of Natural Law is the basis of the right of innocent passage. The discussions of Grotius and Vattel and of the modern authorities are briefly referred to, but the author gives only minor attention to doctrinaire treatment. Part II, which constitutes the major portion of the work, presents a systematic account of the treaties and practices relating to international rivers, from the *Conseil Exécutif* of 1792 relating to the Scheldt and the Meuse, to the present day administrations of the Lower Danube and the Congo under joint supervision. Out of the maze of documents, one obtains a fairly clear picture of problems and solutions, though we think the results are somewhat obscured by accounts of the diplomatic processes. In Part III, the author draws a few important conclusions. The development of international control of rivers must be divorced from the changing policies of foreign offices and placed in the hands of mixed commis-

<sup>1</sup> October, 1916, Vol. X, p. 798.

sions empowered to act constructively in regard to improvements necessary for the larger commerce of all nations. The success of the Danube Commission is the illustrious example, whereas the regulation of the Rhine has heretofore been the source of much friction. It is curious and yet perhaps characteristic that, though the Act of Navigation for the Congo, elaborated at Berlin, 1884-1885, provides for an international commission charged with the execution of the provisions of the Act, it was never constituted, and the five riparian governments themselves supervise the application of the treaty.

Dr. Laun is professor at the University of Vienna. His book constitutes a report made at the request of the so-called Neutral Peace Conference held at Stockholm in 1916. Both authors are in agreement in so far as they deem it important that rivers, on the one hand, and straits and canals on the other, should be the subject of some standard international regulation rather than of particularistic rule. Perhaps no strictly uniform system can be devised to accommodate the many peculiar problems due to geographical environment, but especially Laun emphasizes the need of a normal system, even though exceptions might have to be numerous.

Laun's book devotes rather more attention to international control as affected by a state of war. We believe that some of his solutions do not sufficiently take into account the widespread distrust which the present war has engendered in regard to self-denying treaties passed in peace-time but intended to control in time of war, especially where the enemy would substantially profit. Internationalization must signify international administration, we believe, if his measures are to become practical, and not merely the creation of international servitudes. Perhaps the promised League of Nations will help to solve some of these difficulties.

Both authors are entitled to commendation for having treated their material objectively. Both books were written in war time by subjects of opposing belligerents, yet the tone of both is dispassionate though their points of view very.

ARTHUR K. KUHN.

*The Grotius Society. Volume III. Problems of the War.* Papers read before the Society in the year 1917. London: Sweet & Maxwell, Limited. 1918, pp. 139.

Brief, pointed, impartial and informing, several of the papers in this collection would serve as articles for an encyclopædia of international law. Very little discussion that followed the reading of the papers is printed, but whatever appears has the compactness of textbook style which contrasts favorably with that of the diffuse stenographic reports that usually record the debates of an American convention. With one or two exceptions, the papers are confined to technical questions that have been raised by the war, and all of them are of a practical nature. Sober in treatment, and neither speculative nor sentimental in substance, they include neither projects for a United States of the World nor a scheme for the enforcement of the decrees of an international court; but in 1917 the topic of a league of nations was growing in the British mind. "Treaties of Peace," by Commander Sir Graham Bower, deals with treaties that brought to a close the War of the Spanish Succession, the Napoleonic War and the Congress of Vienna, the Anglo-American War of 1812, and the Crimean War. Viewing them from the standpoint of effecting permanent peace, and not merely of temporarily ending a conflict, Commander Bower dwells upon the good example of the Treaty of Ghent. Although he refrains from making proposals as to the present treaty of peace, he makes a summary of the lessons that he has drawn, which might be taken as suggestions by the peace commissioners of the associated Powers. "Belligerent Merchantmen in Neutral Ports," by Sanford Cole, who cites the controversy between Germany and Portugal, takes the ground that a neutral is not obliged to give unconditional hospitality to belligerent ships in time of war, either by admitting them to its ports or by refraining from requisitioning them if they are already in port. "The Black List," by J. E. G. de Montmorency, derives that list, which some people have thought a British invention, from prize court cases decided in American courts during the Civil War. In "*The Deutschland*" Judge Atherley-Jones holds that the submarine of that name, not from its warlike build only, but also as the announced organ of the German state, should be given both by neutrals and belligerents the status of a warship. "International Law Teaching," by E. A. Whittuck, one of the most interesting papers in this collection, shows that in the

British Empire generally, international law, which is not required as a qualification for the foreign office, the diplomatic or the consular services, and is lightly regarded by the Council of Legal Education that represents the Inns of Court, is taught in a few educational centers like Oxford, Cambridge and London by a few great men to a few students to whom it is usually an optional subject for a university degree. Salaries of instructors in international law are generally small, and in some instances their status in the academic world is lower than it should be. The Admiralty is the only government department that has provided direct instruction in international law, employing authorities like Dr. Lawrence and A. Pearce Higgins; but it is hoped that it will become a more popular study in the future and be better known than it is to British statesmen, who, as a rule, have to depend upon the advice of specialists, only a limited number of whom may now be called upon for assistance. Mr. Whittuck pays tribute to the efforts of the American Society of International Law to put the teaching of this subject on a scientific basis. "The Control of Air Spaces," by J. E. G. de Montmorency, takes the ground that the sea-law of effective occupation, as laid down by the British writer Hall, applies to the air and that, therefore, the law of the air gives to a nation that in time of war can effectively occupy or strategically control by exclusion the high air spaces in super ocean areas or above such seas and straits as the Black Sea, the Bosphorus and the Dardanelles, the right of temporary ownership in them, subject to regulated rights of innocent passage. "Legal War Work in Egypt," by Sir Malcolm McIlwraith, describes the simplification and unification by the military authorities, during the present war, of the complex laws of Egypt and shows that discriminating privileges and obstructions to justice which existed under the Capitulations have been eliminated and may be permanently abolished later by civil legislation. Emphasizing the necessity of common markets, L. P. Rastorgouëff, in "The Revolution and the Unity of Russia," offers a solution of problems of nationality in that country through a federation rather than a separation of its states. "The Relations of the Prize Court to Belligerent Policy," by Sir Francis Piggott, raises the question whether it is expedient for prize courts to be given the power to declare invalid Orders in Council which carry out the policy of the government. A discussion, showing some misunderstanding of the writer's meaning, but on the whole affirming the

validity of international law and its superiority to government policy, follows. H. S. Q. Henriques and Dr. Ernest J. Schuster differ radically in discussing the relative merits and the basic ideas of the two systems of citizenship that are elucidated in their studies entitled "The *Jus Soli* or the *Jus Sanguinis*?" "Reciprocity in the Enjoyment of Civil Rights," by Wyndham A. Bewes, closes this valuable series of papers with a recommendation of generosity toward foreigners, whether as individual litigants seeking to enforce judgments in court or as persons needing judicial assistance, the benefits of workmen's compensation acts, the copyright or the bankruptcy laws.

JAMES L. TRYON.

*The West Florida Controversy, 1798-1813: A Study in American Diplomacy.* By Isaac Joslin Cox. (Albert Shaw Lectures in Diplomatic History, 1912.) Baltimore: The Johns Hopkins Press. 1918, pp. xii, 699. 4 maps. \$3.00.

This is a thorough, scholarly, and exhaustive study of the subject by one of the recognized authorities in the history of the Mississippi Valley and the Spanish Southwest. He has made use of practically all writings of value by earlier investigators in the field, and in addition has drawn upon manuscript collections in both state and national archives of the United States and in the foreign countries which might reasonably be expected to contain pertinent material, notably Mexico, Spain, France, and England. Any future investigator who goes gleaning in the same field will discover that very little has been allowed to escape the sickle or fall from the hands of this indefatigable reaper.

Geographically, the area covered by the book is small; but in order fully to set forth the controversy it was necessary to study the activities in this region of three nations besides the United States, namely, Spain, France, and England. Chronologically, the study confessedly begins with 1798; yet in the opening chapters it necessarily goes into much earlier events in order to explain the origins of claims then existing.

After disposing of these origins, the author studies the activities of pioneers and filibustering parties from the United States; follows the long, devious, futile negotiations of United States diplomatic representatives at the French and Spanish courts; describes the establishment of the insurgent government at Baton Rouge; reviews the steps

leading to and putting into effect the intervention of the United States, and describes the incorporation of the territory into the Union and the adjustment of its government.

A chapter on "Mobile and the Aftermath" studies the relations between the West Florida controversy and the second war with Great Britain; and the final chapter, the seventeenth, on the "Conclusion of the Controversy," traces rapidly the negotiations with Spain from 1813, which, according to the title of the book, is its chronological end, to their logical conclusion in the treaty with Spain of 1819-21, which finally ceded to the United States all of Spain's claims not only to West Florida, but also to East Florida and the region west of the Mississippi lying east and north of the line of 1819, drawn from the Gulf of Mexico to the Pacific Ocean.

Dr. Cox explains, but makes no attempt to justify, the acquisition of the Floridas. After saying that "intrigue, craftiness, and mendacity were the accepted weapons" of the European diplomats with whom Jefferson, Madison, Monroe, and J. Q. Adams had to contend in this controversy, he adds: "Their American competitors claimed to be men of another stripe. Yet even when diplomacy descended to the plane of sordid bribery, the executive and his counsellors were willing to profit by it."

The fearless author points to the century of Latin-American justifiable distrust and suspicion as part of the price paid by the United States for this territory thus acquired with scant claim and by questionable means, and says: "There is little cause for wonder, therefore, that the story of how West Florida was acquired has remained a perpetual tangle, inexplicable, discreditable, and generally ignored."

Either imbued with the instinct of a dramatist, or actuated by a belief that the really worth-while reader would pursue his story to the last of its nearly seven hundred pages, Professor Cox reserved for his concluding paragraph what one usually expects to find in the preface, that part of a book which someone has aptly defined as the last thing which the writer writes and the first thing which the reader reads. It follows:

As a phase of frontier expansion its acquisition can be more readily understood. The various steps which led up to it were not wholly praiseworthy, but they were the natural phases of a popular movement into the wilderness. The pioneers who took part in it had pressed into an area that physiographically belonged to the United States and they undertook to make this relation a political one also. They occupied the territory by peaceful means, dispossessing few that

had any legitimate claim for redress. They outstripped the diplomat and forced his hand, and in the final settlement their deeds, though obscured under a cloud of words, formed the determining factor. If the preceding chapters have made this clear, the writer has accomplished his purpose.

His preface the writer has confined to a modest statement concerning his sources and to acknowledgments of his indebtedness to the many who had rendered him assistance. The index covers thirty double-column pages, is carefully worked out, and usable. If any adverse criticism can justly be made against any phase of the author's work it is that the story has been made longer than was necessary.

The mechanical work of the publishers is satisfactory except in one respect, that is, the book is so loosely bound that it feels as if it were going to fall to pieces the first time it is opened; but this is a feature common to the recent issues in the series.

WM. R. MANNING.



## PERIODICAL LITERATURE OF INTERNATIONAL LAW

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## THE OBLIGATION TO RATIFY TREATIES

### IS RATIFICATION NECESSARY FOR THE VALIDITY OF A TREATY?

ONE of the earliest examples of a sort of ratification is found in the treaty between Justinian and the Persian King, Chosroes, in 561 A. D. In this case the sovereigns agreed to accept that which their plenipotentiaries had promised and agreed upon.<sup>1</sup> The French-Swiss alliance of May 28, 1777, was sanctioned by solemn oaths.<sup>2</sup> It was the custom in earlier times to take hostages to insure ratification; this Grotius believed entirely proper. The oath gave way to a mere act or declaration of ratification.

Grotius likened a plenipotentiary to a mandatory, holding that all agreements reached by him were binding upon the sovereign from the time of signature, unless the secret instructions were transcended.<sup>3</sup> Thus he regarded ratification as a mere form, not affecting the validity of the treaty. Likewise Martens, writing in 1789 at the time of the adoption of the Constitution of the United States, believed that if a mandatory had not exceeded his secret instructions, all that he agreed to was binding upon the state represented, and that the law of nations required no particular ratification (*ratification particulière*).<sup>4</sup> Pufendorf regarded treaties valid from signature and thought ratification superfluous.<sup>5</sup>

It should be remembered that the older writers were accustomed to absolute sovereign relationship and wrote before the period when constitutional bodies developed and took away from the kings and heads of states a part of the supreme power. Among the powers taken away from the sovereigns or heads of states in many cases, has been certain powers in regard to treaty-making. Such a division of the treaty-power occurred in 1789, when the Constitution of the United States vested that power in the President and the Senate. Certainly

<sup>1</sup> Du Mont, *Supplement au Corps Universale*, II, 197.

<sup>2</sup> Wegmann, *Die Ratifikation von Staatsvertraegen*, p. 3.

<sup>3</sup> *De Jure Belli ac Pacis*, III, 20, 52.

<sup>4</sup> *Droit des Gens*, Art. 48.

<sup>5</sup> *De Jure Naturæ et Gentium*, lib. III, cap. IX, art. 2.

after its adoption it could not forcefully be maintained that ratification was unnecessary for the validity of treaties to which the United States was a party. No authority does so hold, yet there is considerable difference of opinion as to the extent of the obligation to ratify. The German writer, Wegmann, holds that ratification in general is somewhat superfluous (*etwas ueberflussiges*) and inconsequential (*nichtssagendes*).<sup>6</sup> For most leading authorities, however, ratification is necessary for the validity of treaties. Usage has come to require ratification in case of all treaties.

The question of the necessity for ratification is now hardly of practical interest, says Despagnet, since "*qu'il n'y a peut-être plus un seul traité qui ne contienne de nos jours la réserve de la ratification.*" He makes an exception, however, of conventions between chiefs of state who themselves have full treaty power. "The necessity of ratification," says Hall, "may be taken as practically undisputed, and the reason for the requirement is one which prevents it from being a mere formality."<sup>7</sup> An even stronger statement is made by Pradier-Fodéré, who says that "*Aucun traité n'est définitif avant d'avoir été ratifié.*"<sup>8</sup>

The view that ratification is an essential and necessary step in the making of a valid treaty is confirmed and strengthened by a consideration of partial ratification, of which several instances are recorded. Citing the Act of Brussels of July 2, 1890, which was only partially ratified by France with the assent of the other contractants, Despagnet says that ratification should be integral and without modification or reserve, unless the restrictions are admitted by all the contractants.<sup>9</sup> In his report to the plenary session of the London Naval Conference of 1909, Professor Louis Renault said, regarding the rules agreed upon by the Conference commissions for the regulation of maritime warfare:

Les règles contenues dans cette Déclaration touchent à des points très important et très différent. Elles n'ont pas été acceptées avec

<sup>6</sup> *Staatsvertrage*, p. 4, note 9.

<sup>7</sup> *International Law*, 7th ed., p. 340.

<sup>8</sup> Pradier-Fodéré's edition of Grotius, ftn., p. 144.

<sup>9</sup> *Droit International Public*, p. 689, 4th ed., by Boeck, 1910.

le même empressement par toutes les Délégations; des concessions ont été faites sur un point en vue de concessions obtenues sur un autre. L'ensemble a été, tout balancé, reconnu satisfaisant. Une attente légitime serait trompée si une puissance pouvait faire des réserves à propos d'une règle à laquelle une autre puissance attache une importance particulière.<sup>10</sup>

In such international treaties as the Brussels Treaty of 1890, The Hague Treaties of 1899 and 1907, and the Versailles Treaty of 1919, the general understanding is that they are concluded *ad referendum*, and must be approved and ratified by the several governments concerned as is constitutionally provided. Particularly is this true, because legislation is usually necessary to carry treaties of such broad scope into effect.

The attitude adopted by the Government of the United States is expressed clearly and unequivocally by President Washington in a special message to Congress, September 17, 1789, in which he says:

It is said to be the general understanding and practice of nations, as a check on the mistakes and indiscretions of ministers or commissioners, not to consider any treaty, negotiated and signed by such officers, as final and conclusive, until ratified by the sovereign or government from whom they derive their powers. This practice has been adopted by the United States respecting their treaties with European nations, and I am inclined to think it would be advisable to observe it in the conduct of our treaties with the Indians.<sup>11</sup>

Regarding the Jay Treaty of 1795, President Washington further expressed himself on the treaty-making power:

The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic, for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief to other persons. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate,

<sup>10</sup> Proceedings of the International Naval Conference, British State Papers, Miscellaneous No. 5 (1909), p. 375.

<sup>11</sup> Quoted by Wharton, International Law Digest, II, p. 6.

the principle on which that body was formed confining it to a small number of members. . . .

The course which the debate has taken on the resolution of the House leads to some observations on the mode of making treaties under the Constitution of the United States.

Having been a member of the General Convention, and knowing the principles on which the Constitution was formed, I have entertained but one opinion upon this subject; and from the first establishment of the government to this moment, my conduct has exemplified that opinion. That the power of making treaties is exclusively vested in the President, by and with the advice and consent of the Senate, provided two-thirds of the senators concur.<sup>12</sup>

On May 6, 1794, Mr. Randolph, Secretary of State, wrote to President Washington as follows:

By the Constitution of the United States . . . the President has the power to make treaties "by and with the advice and consent of the Senate, . . . provided two-thirds of the Senators present concur.

The Secretary of the Treasury and the Secretary of War being of opinion that it was constitutional and expedient to empower Mr. Jay to conclude a treaty of commerce with Great Britain, his powers were drawn conformably with this idea. Their reasons for so holding they committed to writing; and the same course was pursued by Mr. Edmund Randolph, then Secretary of State, who entertained different sentiments on the subject. Mr. Randolph took the view that to permit a treaty of commerce to be signed by Mr. Jay and transmitted to the United States for ratification would be "to abridge the power of the Senate to judge of its merits" since, "according to the rules of good faith, a treaty which is stipulated to be ratified ought to be so, unless the conduct of the minister be disavowed and punished"; and that, if Mr. Jay was permitted to sign a treaty, no form of expression can be devised to be inserted in it which will not be tantamount to a stipulation to ratify or leave the matter as much at large as if he had no such power.<sup>13</sup>

Regarding the Colombia Treaty of 1825, Secretary of State Clay wrote to Mr. Addington, British Minister at Washington, as follows:

The Government of His Britannic Majesty is well acquainted with the provision of the Constitution of the United States by which the Senate is a component part of the treaty-making power; and that the consent and advice of that branch of Congress are indispensable in the

<sup>12</sup> Richardson, Messages and Papers, 1, pp. 194-195.

<sup>13</sup> 6 MS. Dom. Let., 251; quoted by Moore, Digest, V, p. 193.

formation of all treaties. According to the practice of this Government, the Senate is not ordinarily consulted in the initiatory state of a negotiation, but its consent and advice are only invoked after a treaty is concluded, under the direction of the President, and submitted to its consideration. Each of the two branches of the treaty-making authority is independent of the other, whilst both are responsible to the people, the common source of their respective powers.<sup>14</sup>

## TREATY-MAKING POWERS CLASSIFIED

The constitutions or fundamental laws of various states readily suggest the grouping of treaty powers under three heads: (A) Where the head of the state may make treaties without any constitutional limitation; (B) where such limitation is made for only certain types of treaties, as those ceding territory, involving financial obligation, affecting private rights, etc.; (C) where all treaties require approval of a constitutional body other than the executive who makes them.

A. In this class may be placed Japan, and Russia as she was before the fall of the monarchy. The Emperor of Japan has full treaty power.

B. A majority of the leading Powers fall into this class. It includes England, France, Italy, Belgium, the old Austria-Hungary, the old Germany, and several of the smaller Powers.

a. England.—While it is true that theoretically the Crown possesses the prerogative in regard to treaties, and conceivably might make any treaty without the approval of Parliament, yet, in the practical working of the British governmental system, the Government is so responsible to the will of Parliament that no Premier would allow a treaty to be made which was strongly opposed by that body; moreover, when legislative enactment must give force and effect to a treaty, it is now generally understood that Parliament must give its approval.

The English treaty power is described by Ridges as follows:

In England the treaty-making power is vested in the Crown, acting upon the advice of its responsible councillors, *viz.*, the Cabinet, or, in matters of less importance the Secretary of State for Foreign Affairs. . . .

It seems to be generally conceded, however, that the Crown may make a treaty ceding territory without the consent of Parliament;

<sup>14</sup> American State Papers, Foreign Relations, V, p. 783.

and that treaties, concluding peace or declaring war are also valid without Parliamentary sanction. In either of the latter cases, however, the necessity for the consent of Parliament would be indirectly supplied where the terms of peace or the declaration of war necessitated a parliamentary grant of money, and in the case of a disgraceful peace being concluded without parliamentary sanction the royal prerogative would probably not shield the responsible minister from an impeachment of the Commons. Conventions relating to commerce require parliamentary sanction (*semble*) when they impose taxation upon, or interfere with, the private rights of a subject.<sup>15</sup>

b. The French constitutional law on the relation of the public powers, July 16, 1875, provides:

ART. 8.—The President of the Republic shall negotiate and ratify treaties. He shall give information regarding them to the Chambers as soon as the interests and safety of the state permit.

Treaties of peace and of commerce, treaties which involve the finances of the state, those relating to the person and property of French citizens in foreign countries, shall be ratified only after having been voted by the two Chambers.

No cession, exchange, or annexation of territory shall take place except by virtue of a law.<sup>16</sup>

c. The Belgian Constitution of February 7, 1831, provides:

ART. 68.—The King commands the forces both by land and sea, declares war, makes treaties of peace, of alliance, and of commerce. He shall give information to the two Houses of these acts as soon as the interests and safety of the state permit, adding thereto suitable comment.

Treaties of commerce, and treaties which may burden the state, or bind Belgians individually, shall take effect only after having received the approval of the two Houses.

No cession, exchange, or addition of territory shall take place except by virtue of a law.<sup>17</sup>

d. The Italian Constitution of March 4, 1848, provides:

ART. 5.—To the King alone belongs the executive power. He is the supreme head of the state; . . . makes treaties of peace, alliances, commerce, and other treaties, communicating them to the Houses as

<sup>15</sup> Constitutional Law of England, p. 534, 2d ed. (1915).

<sup>16</sup> Dodd, Modern Constitutions, I, 292.

<sup>17</sup> *Ibid.*, p. 137.

soon as the interests and security of the state permit, accompanying such notice with opportune explanations; treaties involving financial obligations or alteration of the territory of the state shall not take effect until after they have received the approval of the Houses.<sup>18</sup>

e. The Austro-Hungarian treaty law of December 21, 1867, provides:

ART. 6.—The Emperor shall conclude political treaties.

The consent of the Reichsrat is necessary for the validity of any treaties of commerce or political treaties which impose obligations upon the Empire, upon any part thereof, or upon any of its citizens.

This law was modified and supplemented by the following law adopted upon the union with Hungary:

SECTION I.—The following affairs are declared common to Austria and Hungary:

a. Foreign affairs, including . . . measures relating to international treaties, reserving the right of the representative bodies of both parts of the Empire (Reichsrat and Hungarian Diet) to approve such treaties, in so far as such approval is required by the Constitution.<sup>19</sup>

f. The German Constitution of April 16, 1871, provides:

ART. II.—To the King of Prussia shall belong the presidency of the Confederation, and he shall have the title of German Emperor. It shall be the duty of the Emperor to . . . enter into alliances and other treaties with foreign countries. . . . So far as treaties with foreign countries relate to matters which, according to Art. 4, are to be regulated by imperial legislation, the consent of the Bundesrat shall be required for their conclusion, and the approval of the Reichstag shall be necessary to render them valid.<sup>20</sup>

C. In this group are the United States, Brazil and Portugal. The Constitution of the United States has been discussed above.

b. The Brazilian Constitution of February 24, 1891, provides:

To the President of the Republic shall belong the exclusive right: To enter into negotiations with other countries, to conclude agree-

<sup>18</sup> Dodd, *Modern Constitutions*, Vol. II, p. 5.

<sup>19</sup> *Ibid.*, Vol. I, p. 88.

<sup>20</sup> *Ibid.*, pp. 330-331.

ments, conventions, and treaties, always referring such treaties and conventions to the Congress. . . .<sup>21</sup>

c. After giving the King power to make treaties, the Portuguese constitutional charter of July 5, 1852, modifies the old charter of 1826 by requiring that:

Every treaty, concordat, or convention which the government may conclude with any foreign Power shall, before ratification, be approved by the Cortes in secret session.<sup>22</sup>

An examination of the constitutions or fundamental laws of the various states shows that while it is still possible for some states to conclude treaties which are valid without a constitutional body's approval, yet the whole tendency is to require such approval. This is shown by amendments to the constitutions of some states, or by modifications of their fundamental laws. The increasing number of multipartite treaties which always require ratification is an example of the tendency for the ratification requirement for all treaties.

#### EXTENT OF OBLIGATION DEPENDENT UPON THE FUNDAMENTAL LAW OF THE CONTRACTING PARTIES AND THE POWERS GIVEN TO THE NEGOTIATORS.

An examination of the fundamental laws of the leading Powers has also shown that ratification is, in some states, a constitutional part of the making of a valid treaty; and that in others, only certain kinds of treaties must be approved for ratification by a constitutional body other than the negotiating functionary or the person giving him negotiating power. It is thus seen that in a given negotiation, the powers of the negotiator are dependent, first, upon the treaty power of the person, if other than himself, from whom he derives his delegated power; and second, the precise powers given him for the negotiation in which he is engaged. If the head of a state engages directly in the negotiation of a treaty, he has no more power than he is competent to clothe his representative with; nor has he more than is given him by the fundamental law of his state.

Ordinarily it is assumed that the negotiators are familiar with

<sup>21</sup> Dodd, *Modern Constitutions*, p. 165.

<sup>22</sup> *Ibid.*, II, p. 163.



the steps through which the treaty must pass in each of the states engaged in a given negotiation, but such knowledge is not always possessed. It aids, however, in anticipating the kind of treaty that will be approved, when the treaty power in each state is understood by all the negotiators. "Without doubt," says Geffken, "a government should know the various phases that the project must follow at the hands of the other contractant; it is not able to raise reclamations if the treaty fails in one of these phases."<sup>23</sup>

"A state is responsible for, and is bound by, all acts done by its agents within the limits of their constitutional capacity or of the functions or powers entrusted to them."<sup>24</sup>

#### GROUNDS WHICH HAVE BEEN SUGGESTED WHICH JUSTIFY THE REFUSAL TO RATIFY.

Following are the grounds suggested by various writers and statesmen as justifying the refusal to ratify treaties:

1. When the negotiator transcends his instructions;
2. When force or menace has been applied to the person of the negotiator;
3. If physical or moral impossibility of fulfillment of the treaty develops before the time for ratification expires;
4. Mutual error of the negotiators respecting matters of fact which have a decisive bearing on the treaty;
5. A change in the circumstances under which the treaty was signed;
6. If clauses contrary to the public law of any of the contractants are incorporated in the treaty;
7. Lack of proper credentials on the part of the negotiator;
8. Failure to meet the approval of the necessary authority which has a voice in the treaty-making.

#### INSTANCES OF REFUSAL TO RATIFY TREATIES.

1. The Monroe-Pinckney Treaty between the United States and Great Britain, signed December 31, 1806, was not ratified by the

<sup>23</sup> Geffken's Heffter, note, p. 201.

<sup>24</sup> Hall, International Law, 7th ed., p. 332.

United States. President Jefferson did not submit it to the Senate, thus establishing a precedent followed in several instances by later Presidents.<sup>25</sup>

2. On August 11, 1802, a claims convention was signed by the United States and Spain. It was sent to the Senate on January 11, 1803, and on March 3d that body advised against ratification. The Spanish Minister obtained an opinion from five influential lawyers on an abstract case so framed as to cover the points in dispute regarding claims. These opinions were in favor of the Spanish contention. On January 9, 1804, a second vote was taken in the Senate and ratification was advised. Spain was by this time unwilling to ratify, and on October 13, 1804, Yrujo, the Spanish Minister at Washington, wrote Secretary of State Madison as follows:

By the communications I have made to this Government . . . you are informed of the just motives His Catholic Majesty has for not ratifying the convention pending between our two Governments, except on certain conditions, founded on the most rigorous justice, and necessary, as well to the honor of his sovereignty, as to the interests of his subjects. That His Majesty has the right to propose the alteration which he may judge proper for these objects, before the ratification, is indisputable, not only from the expression which is found in the seventh article of the said convention which says: "the present convention shall have no force or effect until it be ratified by the contracting parties," but from many other antecedent examples.<sup>26</sup>

Secretary Madison replied:

. . . Were it necessary to enforce these observations by an inquiry into the right of His Catholic Majesty to withhold his ratification in this case, it would not be difficult to show that it is neither supported by the principles of public law, nor countenanced by the examples which have been cited. According to the former, such a refusal ought to be founded either on a departure of the negotiating minister from his instructions, or on intervening occurrences, or on some surprise or deception. Neither of these can be alleged. The Spanish Government itself was privy to the negotiation, leaving, consequently, its

<sup>25</sup> Other examples of the Executive withholding treaties from the Senate are the treaty with Mexico, March 21, 1853, relative to a passage across the Isthmus of Tehuantepec; an extradition treaty with Colombia, March 30, 1872; and a trade-mark convention with Switzerland, February 14, 1885.

<sup>26</sup> American State Papers, Foreign Relations, II, 624.

final act of ratification the merest ceremony. No new facts connected with the subject have come to light. The negotiation was so long on foot, and so fairly conducted, that neither surprise nor deception can be pretended. . . . Another distinction absolutely decisive is, that the conditional ratification proceeded from the Senate, who, sharing in treaties on the final ratification only, and not till then even knowing the instructions pursued in them, cannot be bound by the negotiation like a sovereign, who holds the entire authority in his own hands. When peculiarities of this sort in the structure of a Government are sufficiently known to other Governments, they have no right to take exception at the inevitable effect of them.<sup>27</sup>

Finally, after sixteen years, this convention was ratified by Spain, the ratifications being exchanged on December 21, 1818. It was annulled by Article X of the Florida Treaty of 1819.

3. The Florida Treaty of 1819.—The instructions of the Spanish King to Don Luis de Onís, who, with John Quincy Adams, negotiated the treaty of 1819, were as follows:

Obliging ourselves as we do hereby oblige ourselves and promise on the word and faith of a King, to approve, ratify, and fulfill, and cause to be inviolably observed and fulfilled, whatsoever may be stipulated and signed by you; to which extent and purpose, I grant you all authority and full power, in the most ample form, thereby as of right required.<sup>28</sup>

Shortly after the signature of the treaty, February 22, 1819, question arose concerning the eighth article relating to land grants made by the King to the Duke of Alagon, Captain of the Bodyguards; Count of Puñon Rostro, Treasurer of the Household, and Don Pedro de Vargas, His Majesty's Chamberlain. Adams had understood that the grants were annulled by the treaty. Upon pressure by Adams and Hyde de Neuville, the French Minister at Washington, who had acted as intermediary in the negotiation, De Onís said:

With the frankness and good faith which have uniformly actuated my conduct, and which distinguish the character of the Spanish nation, I have to declare to you, sir, that, when I proposed the revocation of all the grants made subsequently to the date above mentioned

<sup>27</sup> Madison to Yrujo, October 15, 1804, American State Papers, Foreign Relations, II, 625; the conditional ratification referred to is the Jay Treaty of 1795.

<sup>28</sup> American State Papers, Foreign Relations, IV, 657.

(January 24, 1818), it was with the full belief that it comprehended those made to the Duke of Alagon, as well as any others which had been stipulated at that period.<sup>29</sup>

On August 18, 1819, Secretary Adams wrote Mr. Forsyth, the American Minister at Madrid, that the United States would hold Spain responsible "for all damages and expenses which arise from the delay or refusal to ratify, . . ." <sup>30</sup> and on December 16th he advised Mr. Lowndes, Chairman of the Foreign Relations Committee in the Senate, as follows:

The King of Spain was bound to ratify the treaty; bound by the principles of the law of nations applicable to the case; and further bound by the solemn promise in the full power. He refusing to perform this promise and obligation, the United States have a perfect right to do what a court of chancery would do in a transaction of a similar nature between individuals, namely, to compel the performance of the engagement as far as compulsion can accomplish it, and to indemnify themselves for all the damages and charges incident to the necessity of using compulsion. They can not compel the King of Spain to sign the act of ratification, and, therefore, can not make the instrument a perfect treaty; but they can, and they are justified in so doing, take that which the treaty, if perfect, would have bound Spain to deliver up to them; and they are further entitled to indemnity for all the expense and damages which they may sustain by consequence of the refusal of Spain to ratify.<sup>31</sup>

The reasons for non-ratification by Spain were the permission of privateering expeditions from United States' ports against Spanish vessels; the fear that ratification of the treaty and recognition of her American colonies as independent by the United States would be simultaneous acts; and, in general, the sympathy and aid alleged to be given those colonies by the United States. It was hinted that Spain would endeavor to show that De Onis had exceeded his instructions, but this point was not officially pushed by Spain.<sup>32</sup>

<sup>29</sup> De Onis to Adams, March 10, 1819, American State Papers, Foreign Relations, IV, p. 359.

<sup>30</sup> Instructions, VIII, 343.

<sup>31</sup> American State Papers, Foreign Relations, IV, 673.

<sup>32</sup> Upon being informed by Rush, the American Minister at London, that the special envoy, General Vives, had told Lord Castlereagh that he should be able to convince the American Government that De Onis had exceeded his

4. One of the foremost examples of a refusal to ratify occurred in 1841, when a treaty between the King of Prussia and the King of Holland, which provided for the admission of the Grand Duchy of Luxemburg into the German Zollverein, was not ratified by Holland. The six weeks allotted for ratification having elapsed, a lively discussion arose concerning the right of a state to refuse ratification. In this discussion France played a leading part, since one of the reasons given by the Dutch King (Grand Duke of Luxemburg) for non-ratification was the failure of the treaty to give most favored nation treatment to Luxemburg by Belgium and France.

Concerning this treaty, the French Minister of Foreign Affairs, Guizot, said:

Un débat s'est élevé en Europe entre le Roi de Prusse et le Roi des Pays-Bas, sur la ratification d'un traité. On avait soutenu que la ratification d'un traité ne pouvait être refusée que lorsque le négociateur avait outrepassé ses pouvoirs et qu'on le désavouait. J'avais repoussé cette doctrine, quoique parfaitement désintéressé dans la question, en appuyant le Roi des Pays-Bas qui la repoussait, j'avais soutenu que le droit de ratification n'était pas une pure forme; que c'était un droit sérieux, réel; qu'aucun traité n'était conclu et complet avant d'avoir été ratifié, et que si entre la conclusion et la ratification il survenait des faits graves, des faits nouveaux, évidents, qui changeassent les relations des deux puissances et les circonstances au milieu desquelles le traité avait été conclu, le refus de ratification était un droit. J'avais soutenu cela en principe, je n'avais au contraire qu'à mettre en pratique ceux que je venais de soutenir.<sup>33</sup>

An article, supposed to have been inspired from official sources, appeared in the *Journal* of The Hague, November 2, 1841, in which it was held that the instrument drawn up by negotiating ministers was only a treaty project and that the acceptance or rejection was a free right of the sovereign. A note to the Prussian representative, instructions, and in answer to a question, Adams replied: "I said that he [De Neuville] had told me so [that De Onis had not exceeded his instructions]. Onis had told me that by his instructions he could have ceded the Kingdom of Mexico. The Marquis of Casa Yrujo had told Mr. Erving ten times that Onis had 'carte blanche.' The Duke of San Fernando did not pretend that Onis had transcended his instructions, and how could he?" (J. Q. Adams, *Memoirs*, IV, 466.)

<sup>33</sup> *Mémoires pour servir à l'histoire de mon temps*, VI, p. 161.

October 29, 1841, stated that non-ratification was a bounden duty (*Gewissenspflicht*), since the interests of the country were at stake.<sup>34</sup> Commenting on the matter, Wurm said:

Es ist klar, dass man im Haag die Sache weit schwieriger nahm, als die Doktrin des Journal de la Haye uns glauben machen will. Keineswegs glaubte man an ein Recht, nach freier Willkür zu ratifizieren oder nicht zu ratifizieren, sondern nach allem, was vorangegangen, glaubte man sich formell verpflichtet, zu ratifizieren; dies Bewusstsein der formellen Verbindlichkeit war so stark, dass nur die "Gewissenspflicht" überwiegen konnte, und auch diese nur, nachdem sie in Berlin approbirt zu sein scheint.<sup>35</sup>

Although it appears that this treaty was never ratified, the following year Luxemburg did enter the Zollverein. Undoubtedly the discussion provoked by the refusal of the Dutch King to ratify, had considerable influence in determining that ratification is an essential factor in treaty-making.

5. In 1842, the French King, Louis Philippe, refused to ratify the treaty concluded between Austria, England, France, Prussia, and Russia, relating to suppression of the slave trade and the right of visit.<sup>36</sup>

6. A treaty of extradition was concluded between the United States and Prussia and other German States, in 1845. President Polk sent the treaty to the Senate and desired a change in Article III, which stipulated that the contractants need not deliver their own citizens. President Polk thought that since the United States had already done this in several instances, it should not be precluded by the treaty. The Senate advised ratification of the treaty, but did not favor Polk's amendment; the President, therefore, refused to ratify, giving as another reason, the instability of the German states.<sup>37</sup>

7. In 1849, President Taylor refused even to transmit to the Senate a treaty negotiated by Mr. Hise with Mr. Silva of Nicaragua. This was a convenient method of refusing to ratify without receiving the advice and consent of the Senate. Doubtless the President knew

<sup>34</sup> Wegmann, *Staatsverträge*, pp. 34-35.

<sup>35</sup> *Ratifikation*, p. 216.

<sup>36</sup> Bonfils, *Manuel de Droit International Public*, p. 532, 16th ed.

<sup>37</sup> Executive Journal, VII, 7, 433, 462.

that he could not accept the treaty, no matter what the action of the Senate might be.<sup>38</sup>

8. On February 1, 1889, the Senate voted 38 to 15 against a resolution advising ratification of an extradition treaty between the United States and Great Britain, signed at London, June 25, 1886.<sup>39</sup>

9. As in the case of the Florida Treaty of 1819, the Senate voted twice on the question of advising ratification of a treaty concluded August 11, 1874, with Turkey. The letter of transmission, written by President Cleveland, February 27, 1889, gives clearly the facts in this case:

I herewith transmit a report of the Secretary of State and accompanying documents relative to a naturalization treaty between the United States and Turkey, . . . as to the proclamation of which the advice and consent of the Senate is desired. The advice and consent of the Senate were given to the ratification of the convention on the 22d day of January, 1875, but with certain amendments which were not fully accepted by the Ottoman Porte. Because of such non-acceptance the treaty has never been proclaimed. Finally the Turkish Government, after the passage of fourteen years, has accepted the amendments as tendered. But in view of the long period that has elapsed since the Senate formally considered the treaty, I have deemed it wiser that, before proclaiming it, the Senate should have an opportunity to act upon the matter again, my own views being wholly favorable to the proclamation.<sup>40</sup>

The Senate advised ratification on February 28th.

10. When the arbitration treaty with Great Britain was sent to the Senate in 1897, that body desired that Articles VIII and X be stricken out, and to the clause providing that arbitrators be appointed "by the President of the United States," the words "and appointed by and with the advice and consent of the Senate," be added. On May 6, 1897, the Senate advised against ratification.<sup>41</sup>

11. The reciprocity agreement of 1911 between the United States and Canada was rejected by adverse action of the latter.

<sup>38</sup> See letter of Secretary Evarts to President Hayes, March 8, 1880, Senate Ex. Doc., 112, 46th Cong., 2d Sess.

<sup>39</sup> Executive Journal, United States Senate, XXVI, 446.

<sup>40</sup> *Ibid.*, XXVI, 467.

<sup>41</sup> *Ibid.*, XXXI, 102-105.

VIEWS OF AUTHORITIES CONCERNING THE OBLIGATION TO RATIFY  
TREATIES.

An examination of the opinions of writers and authorities shows that upon the subject of ratification three fairly distinguishable views prevail: 1, that no obligation to ratify exists, ratification being purely a matter of discretion; 2, that a moral obligation exists; 3, that where the negotiator has remained within his instructions, a perfect or legal obligation exists.

Among the authorities in group 1 are Bernard, Bonfils, Calvo, Funck-Bretano and Sorel, von Seligman, Hershey, Wilson, Wilson and Tucker.

In group 2 are Bluntschli, Bynkershoek, Bulmerincq, Despagnet, Duer, Fiore, Hall, Hefftere, Jellinek, Twiss, Ullmann, Wharton, and Woolsey.

Group 3 includes Grotius, Klüber, Martens, Field, and Wegmann. (It should be noted that some of these writers held that ratification was unnecessary for the validity of the treaty; at the same time they recognized ratification as a step of formality in treaty-making.)

## CONCLUSION.

It has been noted that at least five authorities believe that ratification may not be withheld. But of these, the earlier writers thought that a treaty was valid at signature and it is clear that their conception of ratification was not the same as that which now prevails, that is, that a treaty is valid only after an exchange of ratifications. Wegmann is the only recent writer who states that a legal obligation to ratify exists; he believes that a gradually developing and existing customary law (*Gewohnheitsrecht*) forbids the refusal to ratify except in a few cases. While it is unquestionable that these writers are much more emphatic than others in expressing their views that a very strong obligation to ratify exists, some doubt must remain as to whether or not they believe it to be a legal obligation.

More assurance can be felt, however, when moral obligation is considered. Certainly those writers who believe in a perfect or legal obligation could also be grouped with those who hold that there is a



moral obligation. This being true, it would seem that the weight of opinion holds that a moral obligation to ratify exists. This obligation increases proportionately with the scope and difficulty of the negotiation of the treaty. As the eminent French jurist, Renault, has said, in a negotiation where many States are represented, there is considerable difficulty in reaching agreements on many points; concessions must be made here, for concessions granted there; and principles which are considered vital by one state may be held unimportant by another. Moreover, the physical difficulty of getting a large group of negotiators together is very great; time is required; large sums must go for the necessary expense; and the negotiators must leave their duties at home. Since a reconsideration of the agreements reached would require a new gathering of the negotiators, it appears that a very high moral obligation to ratify exists, especially in case of multipartite or international treaties.

JOHN EUGENE HARLEY.

## THE AMERICAN-GERMAN CONFERENCE ON PRISONERS OF WAR.<sup>1</sup>

BERNE, SWITZERLAND, SEPTEMBER 24 TO NOVEMBER 11, 1918.

WHEN, in 1914, the Great War broke upon an astonished world, we rather took comfort to ourselves in the thought that no matter how swiftly and vigorously military operations might be prosecuted, the Conventions of Geneva and of The Hague would insure humane care and chivalrous treatment to the prisoners of war of both sides. Perhaps unconsciously we based our feeling of assurance in this regard upon two assumptions. The first of these was that the terms of those conventions were of themselves legally binding upon the parties to the great conflict; and the second that in this day and generation of high development in the elements of morality and humanity the belligerents would feel themselves morally if not technically constrained to abide by the principles, and to follow, in practice, the honorable provisions of the conventions.

There are two particular conventions falling under consideration in this connection. These are, the Convention Respecting the Laws and Customs of War on Land, generally referred to as Hague IV of 1907; and the Convention for the Adaptation to Maritime War of the Principles of the Geneva Convention of 1906, commonly known as Hague X of 1907. Each of these agreements contains a provisional article, practically identical in the two instances, worded substantially as follows:

The provisions contained . . . in the present convention do not apply except between contracting parties, and only if all the belligerents are parties to the convention.

Had our assumptions in this respect been securely founded, there would perhaps have been no occasion for any of the belligerent par-

<sup>1</sup> The author of this article, Commander Raymond Stone, U. S. Navy, was Assistant Commissioner on the Special Diplomatic Mission of the United States to the Conference.

ties to enter into or even to desire conferences on the subject of the care and treatment of prisoners of war; but in actuality the conventions were not operative for the reason that some of the belligerents were nonsignatory and, also, both the provisions of these conventions and the principles underlying them were ignored and flouted by several of the belligerents, notably by the Central Powers. It should be noted also that the magnitude of the forces engaged in this war and the large number of prisoners taken at the outset of the conflict by both sides were such that adequate preparations for the reception, housing, feeding, and administration, of the prisoners of war were sadly deficient on both sides. Neither side seems to have foreseen with any degree of accuracy the vast responsibility that would devolve upon captor states by reason of the numbers of prisoners of war that might be taken. In addition to this fact, the policy of the Central Powers, particularly that of Germany, a policy sometimes avowed and sometimes very apparent without avowal, which dictated harsh and even inhumane treatment of prisoners of war with the aim and intention of carrying to the enemy population ideas of terror and frightfulness which might deter the population from prompting or encouraging enlistment in the fighting forces of their countries, seemed to render it very necessary that the belligerent countries should enter into some definite agreements prescribing reciprocal and binding rules and regulations covering the general subject of prisoners of war. At least two British-German and two French-German conferences on this subject were held in neutral cities within the first three years of the war.

Upon the entry of the United States into the war, our Government deemed it expedient to utter a pronouncement to the effect that while the Government of the United States, for good and sufficient reasons, did not consider that the actual provisions of the several Conventions of Geneva and of The Hague were operative in this war, it did consider that the principles underlying the provisions were of force and that they would be followed by the United States as a general guide in the circumstances.

From time to time during the earlier stages of our participation in the war efforts were made through diplomatic channels to arrive

at some mutually acceptable *modus vivendi* under which the care, handling, treatment, and pay, of prisoners of war of each country held by the other might be assured and guaranteed. Whether due to the unwillingness of Germany, then in military ascendancy, to really come to an agreement, or to the inherent difficulties of presenting and discussing opposing views through the instrumentality of neutral protecting Powers, negotiations by this means proved disappointingly unsatisfactory. In the meantime, frequent and persistent reports, some of which were well authenticated, concerning the unfavorable, not to say harsh and brutal, treatment by the Germans of prisoners of war belonging to the Entente Allies and to the United States, made increasingly evident the necessity for an actual face-to-face conference of fully accredited representatives of both governments in order to discuss and arrive at some definite accord with guarantees of fulfillment.

During the spring and summer of 1918 the proposal for an American-German conference in some neutral country was made by our Government and eventually agreed to by the Imperial German Government. After some delay, the date of the convening of this conference, at first suggested for the early part of August, was finally decided upon as the 23rd of September, and the place of meeting as Berne, the capital of the Swiss Confederation. It was believed at the time that Germany was much more interested in discussing the situation of German civilians in the United States than in treating the subject of prisoners of war, and that the German Government had assented to a conference largely in order that the civilian question might be taken up. At this stage of the war there were not many German prisoners of war in our hands, nor Americans in the hands of the Germans; there were, however, a large number of German civilians in the United State liable to detention under the Espionage Act and other statutes, and a few actually interned in detention camps or under criminal charges before the civil courts. The Government decided to send to Berne a Special Diplomatic Mission composed of delegates representing the State Department, the Navy Department, the War Department, the Department of Justice, and the

American Red Cross. The membership of the commission as finally ordered was as follows:

Honorable John W. Garrett, U. S. Minister to the Netherlands, Chairman of the Commission.

Honorable John W. Davis, Solicitor-General of the United States, Ambassador-elect to Great Britain.

Major-General Francis J. Kernan, U. S. Army.

Captain Henry H. Hough, U. S. Navy.

These four were full commissioners clothed with full powers. There were also a number of assistant commissioners and attachés.

The American Commission first met in full membership at Paris on the 10th of September; and from that date until the 19th of the same month was occupied in the preliminary work of formulating and preparing a proposal in form to be presented to the German Commission when assembled in conference. Our Commission arrived at Berne on the afternoon of the 20th of September, and the members were distributed to several different hotels, it being quite impracticable in the congested condition of hotel accommodations to concentrate them all in one place.

Word was received that because of the recent death of General Friederichs, the head of the German Commission, that commission would not be ready for the assembling in conference until the 24th. The intervening days were spent by the American Commission in putting into final shape the proposal to be submitted by us.

On the afternoon of the 24th the members of our Commission were received in audience by the President of the Swiss Federation, M. Felix Calonder, who immediately afterwards received the German Commissioners, Fuerst zu Hohenlohe Langenburg, Count Montgelas, Colonel von Fransecky, Prussian Ministry of War, Secret Counselor von Keller, Captain Wilke, Imperial German Navy, and Major Draudt, Prussian Ministry of War, along with numerous attachés and assistants.

The Swiss Parliament, or Conseil Fédéral, being in session at this time in the parliament building, the inaugural meeting of the conference was held in the directors' room of the Swiss National Bank on

the Bundesplatz. The Conference was formally opened by President Calonder with a short address of welcome, good wishes, and assurances of hearty co-operation on his part and that of his coadjutors in the administration of the Swiss Government. Brief replies to this address were made by the chairman of the German Commission, Prince zu Hohenlohe Langenburg, and by Minister Garrett.

President Calonder thanked the chairmen of the two delegations for their appreciative words, and expressed the hope that the task before them would be solved satisfactorily. He then introduced M. Paul Dinichert, Minister of the Swiss Department of Foreign Affairs, who assumed the neutral presidency of the Conference and announced the constitution of his Secretariat, to which were appointed Dr. Logoz, professor of Geneva University; Secretary of Legation Borsinger; and Dr. Peter, of the Political Department. M. Dinichert prayed the delegations to help him in his labors, assuring those present that nothing would be omitted on his part to attain the desires of all concerned.

The two delegations agreed that a short but precise report of each plenary meeting should be kept in both English and German, and further agreed that the negotiations should be confidential in character, the seal of confidence as to the proceedings not to be lifted until the conclusion of an agreement and the final adjournment of the Conference *sine die*.

Prince Hohenlohe submitted to M. Dinichert the text of the German proposal to be discussed in the Conference, and Minister Garrett submitted the text of the American proposal.

After the exchange of these *projets*, Colonel von Fransecki and Legationsrat von Keller of the German delegation addressed the Conference, the former in behalf of military prisoners of war and the latter in the interest of interned civilians or civil prisoners. To these addresses there were no rejoinders from the American side of the council table.

It is interesting to note at this stage why in this and in all subsequent proceedings of the Conference the German delegates had chronological precedence. Diplomatic priority is based upon the alphabet. Whether we use the English language, or the German, or the universally accepted diplomatic French, Germany alphabetically

precedes the United States; for in English the order is Germany-United States, in German it is Deutschland-Vereinigten Staaten, and in French it is Allemande-Etats-Unis.

The first plenary meeting, which had lasted about thirty five minutes, was then adjourned in order that both sides might make a preliminary study of the respective proposals, the next meeting to be at the call of the President of the Conference.

Throughout the negotiations in the full Conference the remarks of the one delegation or the other were not addressed directly to the opposite side, but always to the President, and were by him transmitted in translation to the recipients. In this difficult situation M. Dinichert displayed great tact, consideration, and versatility of language, he being a cultured gentleman of ability and wide experience and possessing fluency in the English, French, and German tongues. In the meetings of the joint subcommittee, hereafter described, by which the actual detailed work of the Conference was carried out, the same procedure of addressing all remarks to the chairman of the subcommittee, usually M. Dinichert, but sometimes one of the Secretariat, was theoretically in order; it is, however, an interesting matter of fact that in the discussions of the subcommittee the views of the two sides were not infrequently exchanged directly across the council table, each side using its own language, with which the members of the other side were, in truth, sufficiently familiar to understand the points of view expressed. This measure of informality was deemed to be necessary in order to expedite the progress of the work before the subcommittee.

The second plenary meeting of the Conference was opened at 4 p.m., of Thursday, the 27th. There were present at this meeting the President of the Conference, the two delegations in full number, the members of the Secretariat and the official stenographers. M. Dinichert opened the meeting and inquired of the two delegations whether they were ready to give an opinion on the two *projets*.

Upon an exchange of views it was found that the proposals contained some articles substantially the same, and also some articles in each which were not in any way touched upon in the other. It was decided that in order to bring the two proposals as nearly as possible

into agreement the one with the other, a joint subcommittee composed of five members from each delegation should be appointed; this joint subcommittee to meet from day to day, and under the direction of the respective commissions to formulate and present for approval a joint agreement. It was expressly stipulated that the conclusions of the subcommittee should not be binding upon the full commissions, but should serve only as a basis for agreement.

The members of the joint subcommittee were the following:

For the American Commission: Colonel Grant, Commander Stone, Mr. Herter, Mr. Storey, Mr. Russell.

For the German Commission: Counselor von Keller, Captain Wilke, Major Draudt, Dr. Roediger, Dr. Bourwieg.

Comparison of the two proposals, as originally submitted (not reproduced here for lack of space), serves to show almost at a glance the features wherein the ideas and ideals of the opposing delegations and the peoples whom they represented were harmonious and wherein they were discordant. The completed agreement, the English language version of which appeared in the Supplement to this JOURNAL for January, 1919, contains, I think, all the essential points of value in the several British-German and French-German accords, as well as a number of additional points which were considered by us to be no less essential and for which the American Commission, working through its subcommittee, had to contend persistently, if quietly, throughout the daily meetings which covered a period of nearly seven weeks of negotiation. One of our greatest difficulties was to convince the German delegates of the necessity, as we saw it, for laying down specifically and in some detail the various points upon which we desired agreement. There was evident a very considerable and obstinate aversion on their part to the use of any other than the most general terms in describing conditions or laying down rules or regulations expressing prohibitions or specifying privileges. We on our side, however, by reason of a great deal of information received from various sources held to be reliable, considered it absolutely essential so to define rights, duties, privileges, customs, in fact all points connected with the treatment of prisoners of war, that there might never be any ground for misunderstanding of conditions or excuses for



failure to carry out the terms of the agreement. In not a few cases the German subcommittee would express agreement "in principle" with articles of our proposal, but at the same time would also express the desire to rewrite in German the article in question; retranslation of the same article back into English usually showed some change from its original terms if not from its essential meaning. I do not say that the changes were intentionally made. The difficulty has been very well stated, I think, by one of our associates, who said, "It is quite impossible to couch a simple (American) idea in a complicated (German) language."

Day in and day out across the council table the various articles of the proposals were discussed. At the outset we rather recognized, although admitting it only to ourselves, that the arrangement of the German *projet* was perhaps more logical than that of our own; and so, at first, we discussed the two proposals together on the basis of considering primarily a German article and in connection with it the American article bearing on the same subject. This seemed to give a certain tactical advantage to the German subcommittee, which appeared to please them somewhat and to which we were keenly alive. Also in considerable measure we followed the general principle that so long as the essential element of an article was retained, the sacrifice of mere language in order to expedite the proceedings was entirely justifiable. Gradually we shifted over from the primary consideration of the German text to using the American text as the model with which the German should be brought into agreement; this was the regular procedure during the latter half of the negotiations. The difficulties due to differences of language were really very much greater than would appear at first thought. In some instances even, they were the cause of greater delay than was actually due to disagreement in principle.

In the course of this paper I shall endeavor to analyze the final accord in its relation to the original separate proposals, explaining, as far as may be practicable, the acceptance, the rejection or modification of each article.

## ANALYSIS OF THE FINAL AGREEMENT

ARTICLE 1.—This article, treating of the repatriation of valid prisoners of war through the medium of exchange, is a combination of the ideas contained in the original German Article 1, and our original Article 1 of Section XVI. In its final form it represents the result of a great deal of discussion, study, and consideration. On the theory that the principal object of holding prisoners of war is to deprive their own state of origin of their services, our commission proposed in our original Section XX the internment in a neutral country of all officers, whether valid or invalid, as soon as practicable after their capture. We did not include the enlisted ranks and grades for the reason that the number of officers taken would be relatively small, and, looking forward to the possibility of large numbers of captives, the practical question for the neutral country or countries would be a very grave one in caring for so grand a total of internés; on this account we restricted the provisions of this section to officers. Imagine our surprise to hear from the German side of the table a most suave and apparently heartfelt objection to this undemocratic (!) discrimination on our part between officers and enlisted men, prisoners of war; a statement to the effect that the German delegation, bearing in mind the conspicuous consideration that the German military authorities had always entertained and exhibited for their men in the ranks, could not face their people at home should they agree to so gross a distinction in the treatment of unfortunate captives! Having thus had the lesson of true democracy read to us, we withdrew the whole section from consideration.

ARTICLE 2.—This article was adopted in order to cover those German prisoners of war in our hands who had been in virtual captivity, either as interned belligerents or as prisoners of war, for more than three years. It was thought to be only just and considerate to arrange for their repatriation; and in the deal we provided for exchange with a corresponding number of American prisoners of war, whether these latter had been in captivity a year or a month. Under this provision the surplus of "trading stock" in our possession assured the speedy return of all American prisoners of war in Germany.

ARTICLE 3.—In all of the discussions relating to prisoners of war there was a tendency to show especial consideration for captives of or beyond middle age. Both the French-German and the British-German agreements put them in a special class; and it was our own opinion, strengthened by information received from various sources, that the hardships of captivity bore more heavily upon men of forty years of age and upward than upon those of fewer years. The original proposition took into account also the question of the headship of families and the number of children in such families. We, however, counter-proposed, and the Germans apparently gladly accepted, the provision in relation to age only and without regard to the question of family responsibilities. This feature invested it with greater liberality.

ARTICLES 4-5.—These articles refer directly to the annex defining invalidism. This particular annex, as adopted, is a new edition, modified and improved through the experience of the Swiss medical officers who have had to administer it, of a similar annex included in the British-German and French-German agreements.

ARTICLES 6-15.—These articles provide for the formation and administration of Medical Traveling Commissions and Commissions of Control, with definition of their duties and prerogatives; they are all explanatory, enacting and amplifying in considerable detail the steps to be taken, not only for the determination of the fact of invalidism, but also the disposition to be made in accordance with the recommendations of the above mentioned commissions. Our delegation felt very strongly that the functions of these medical commissions, including their rights and privileges as well as their duties and obligations, should be definitely laid down in the agreement in order that should there ever arise on the part of either signatory any indisposition to permit these commissions to perform their full duty, the terms of the accord would be so positive that such indisposition could not be properly entertained.

Right here is an illuminating side-light on an important provision contained in Article 12, which stipulates that certain arrangements must be made to forward the work of the medical commissions within the limits of military barred zones. In relation to the activities of the medical traveling commissions the German delegation in subcom-

mittee vigorously objected to any provision authorizing such commissions to visit prisoners of war held within the areas termed "zone of operations" and "line of communications." We, on the other hand, were insistent that such visits should be provided for in terms clear and unmistakable; for we were in possession of positive information to the effect that thousands of Entente prisoners of war were held by the Germans in these barred areas, who never had had and, unless (in the case of American prisoners of war) we should provide specifically therefor, never would have, the benefit of inspection by a traveling commission; and that the lot of prisoners so situated was in general a sad and hopeless one, without the security of neutral inspection, and that they were therefore subject to the grossest abuse. We asked the German delegation to define *operationsgebiet* and *atappengebiet*. They replied that these terms did not lend themselves to exact definition, since the areas they described changed from day to day, indeed with every change in the territorial military situation. In vain we argued the matter with them, reminding them that our joint agreement would be in every particular reciprocal, giving them the corresponding right of medical inspection within our zone of operations and line of communications to that which we would have in theirs. But they were obstinate. They could not and they would not. Then we put it to them straight, and this was it: that owing to the unusual and peculiar location of the military forces of the United States, they being in neither American nor German, but in French territory, our zone of operations must necessarily be defined as covering the whole of France, our line of communications as reaching to the French littoral, or even transatlantic; thus, under their own proposed restrictions no German prisoners of war held by the American military forces in France could enjoy the privilege of medical inspection by a traveling commission. The light dawned upon them; they saw the point; they smiled; they even laughed (at themselves for what they had almost self-imposed).

Some days later they accepted Article 12 without demur.

ARTICLE 16.—Originally Article 16 was Section XIX of our proposal. It prohibited exchange, repatriation, or internment in a neutral country, until the conclusion of a treaty of peace, of the officers

and crews of submarines taken prisoners of war; it held them in a separate and distinct, but otherwise not unfavorable, category from other prisoners of war. This section nearly "broke up the meeting." The German delegation took the stand that the officers and crews of submarine vessels should not and could not be treated by their own Government as in any other category than other members of the governmental armed forces; that they were only carrying out authorized orders and instructions in the performance of their duty; and that the German Government would not admit that they were deserving of any discriminatory treatment as prisoners of war. We on our side were just as positive that the actual operations of the German submarines were such in character as to place their personnel, when captured, in a special class, and therefore, while we for the time being held them in an equal condition with other prisoners of war, we could not see our way clear to enter into any agreement which would permit the return to Germany of any captured submarine personnel prior to the final conclusion of peace. In this view we were in large measure actuated by the knowledge that Germany was much in need of trained submarine personnel, and by the further knowledge that in the British-German agreement at The Hague, 14 July, 1918, never as yet ratified, there had been inserted at different parts of the agreement two articles on this subject as to the meaning of which the two contracting parties were at the present time absolutely at odds.

The deadlock came in the course of a meeting of the subcommittee. The German subcommittee announced that under instructions they could not proceed further in the consideration of the proposals, and that unless our Section XIX should be withdrawn, negotiations on their part must come to an end. Inasmuch as we had neither any intention to give way on this point, nor indeed did our subcommittee have any authority to do so, there was nothing else left to do but to adjourn.

At this stage of the proceedings it looked very much as if the whole Conference might come to naught; but the tact of M. Dinichert, supported somewhat, it may be, by the real underlying desire of the German delegation to reach the all-important question of German civilians interned in the United States, brought about a special and

informal meeting of delegates from the two commissions on the following day, at the conclusion of which the German delegation signified its willingness to continue the negotiations. That delegation, however, represented very strongly that it would be a most difficult matter for them to accept as an integral article of the agreement such a provision as we proposed, especially since it was the mutual intention to publish in each prisoner of war camp a sufficient number of copies of the agreement to keep all prisoners of war informed of its provisions. They contended that such an article, so published, its features being widely known, would exert a most undesirable influence if not a disastrous effect upon the morale of their armed forces. As a matter of fact this was no new conception to us who, at least in our own mind, had already concluded in advance that the publication of this article would most probably have such an effect.

In order to relieve the tense situation the "submarine article," as it came to be known, was permitted to slumber quietly for some days thereafter, and the subcommittee proceeded with its work very much as if nothing had happened to disturb the even tenor of its way. The terms of the "submarine article" were softened somewhat and, after presumably having been submitted to the Berlin Government, it was, near the close of the Conference, adopted in the form in which it appears as Article 16 of the final agreement. In its accepted terms, Article 16 concedes that which was denied in its original form, namely, the internment of submarine personnel in a neutral country. It, however, specifically states that there shall be no repatriation of such prisoners of war until the conclusion of peace. This restriction really accomplishes practically all that we set out to obtain in the first instance; for it denies to the government the services of its trained submarine complements through the process of repatriation.

In connection with the discussion of this article, there should be borne in mind that which apparently escaped our enemy associates often while at the council table, the fact that this entire agreement is entirely and expressly reciprocal and, therefore, should any of our submarines be captured by the Germans, their crews would be subject to exactly the same restrictions and conditions as the crews of German submarines in our hands. The fact is that very often in the course of

the negotiations the German delegation seemed to think and to feel that everything suggested by us was directed against them; whereas complete reciprocity was the keynote of the entire discussion from beginning to end. I do not suggest that a collective conscience not altogether guiltless may have influenced their mental attitude; and it is perfectly true that almost all of the articles suggested from our side, whether they conferred rights, or privileges, or immunities, or what not, were based upon our knowledge by information of the actual conditions obtaining in German prisoner of war camps, or elsewhere under their jurisdiction.

Articles 17-20, inclusive, are merely matters of detail and require no discussion.

Article 21, treating of allowable employment of repatriated prisoners of war, caused us considerable difficulty. At one time there was a proposition, initiated by our side I think, to forbid any governmental employment of prisoners of war repatriated under the terms of this agreement. A little discussion, however, brought enlightenment as to the probable effect of such a provision in both countries. The Germans said very frankly that they positively could not accept such a provision, inasmuch as a large majority of those who might be repatriated would have to be employed in some branch of the government service; and, furthermore, their Government would feel itself morally bound to provide for the repatriates in some way, by employment or otherwise. This reasoning was undeniably sound and logical, and actually applied in the case of our own repatriates. And so, after no little discussion, Article 21 in its present terms was adopted.

ARTICLE 22.—The detailed terms of this article, providing protection for the personal property of prisoners of war, were made necessary by authentic information in our possession concerning the deprivation of the property of prisoners by agents, principal or subordinate, of the German Government. In its final form it presents a measure of compromise in which nothing vital for which we contended was sacrificed.

ARTICLES 23-31.—These articles concern personal treatment; protection from abuse and violence; exemption from being quartered with

criminals and felons and from compulsory measures to extort information relating to military and other secrets; freedom of conversation; integrity of personal valuables and money. The specific terms herein laid down were deemed to be essential in order that certain abuses and malpractices of which we had full and sufficient knowledge might be forbidden under the guarantee of a mutual agreement. Practically every one of these articles was agreed to by the German delegation only after days of discussion and insistent return to them after they from time to time were laid aside. Every act prohibited had, in some form or other and at some time or other, been committed against prisoners of war in the hands of the Germans. The provision of Article 26, for instance, is based upon the fact that one of the nagging, hazing, methods of handling prisoners of war by some of the German prison camp commandants consists in forbidding the prisoners to talk with one another.

Article 27 was based upon well substantiated reports that prisoners of war were stripped of their own clothing immediately after capture and furnished with cheap, inferior garments in substitution. The provision that "no objections exist on hygienic grounds" was incorporated in order that the proper disinfection of clothing of prisoners may take place, inasmuch as it is considered to be imperatively necessary to de-louse the clothes of all prisoners of war as promptly as possible after they are taken, and rarely practicable to return to each man the clothes actually taken from him, but generally feasible to give him a suit at least as good. Article 29, prohibiting the use of dogs as guards unless muzzled, was deemed to be advisable from the humane point of view. The idea of these beasts mangling a prisoner of war attempting to escape, not guilty of any crime but only actuated by the natural and laudable desire to return to his own country, was entirely repugnant to our minds. When in the course of the discussion it was represented to the German delegation that we felt as strongly against the use of bloodhounds in our own country as we did against the use of police dogs in Germany, the picture seemed to come before their eyes of German prisoners of war attempting to escape in the United States being caught and injured by bloodhounds, and they quickly came to an agreement upon this article. Article 30 was inserted in



order to provide against one of the greatest abuses ever reported from the German prisoner of war camps. This abuse consists in the severest form of maltreatment of prisoners under the guise of disciplining for failing to salute their German captors. The brutalities reported as having taken place in connection with this relatively trivial matter were such as to make us very firmly resolved to provide specifically against it in so far as our own people in the hands of the Germans might be concerned.

Article 31 is unique. Its provisions do not occur, as far as I know, in any similar agreements. It is well worth reproducing in its literal fullness, as follows:

All female personnel serving with the armed forces of either of the Contracting Parties, shall, if captured, be given every possible protection against harsh treatment, insult or any manifestation of disrespect in any way related to their sex. They shall be suitably and decently quartered, and provided with lavatories, bathing facilities, and other similar necessities quite separate from those provided for males.

The necessity for this article must be evident to any one who has read the fairly well authenticated reports of the treatment by German officials and officers of enemy women falling into their power.

Article 32, which is substantially identical with Article I of Section III of the American proposal, concerns the prompt collection of prisoners of war well back of the line of front operations. It was under discussion throughout a very considerable period and was not finally agreed to by the Germans until near the close of the negotiations. The object of formulating this article was to prevent by positive provision the practice which had been current on the part of the German military authorities of retaining prisoners of war in the area just back of the front line, where they were exposed to the extraordinary hazards incident to the military operations of attack and defense. The employment of prisoners of war within this area had lent itself to numerous and flagrant abuses, and our delegation felt that the only practical way of obviating such abuses was to specifically require such removal from danger as that stated in this article. The second paragraph of Article 32 was instigated by persistent re-

ports that the enemy wounded on the field of battle were grievously neglected by the advancing German troops.

ARTICLE 33.—A study of the situation of our prisoners of war in the hands of the Germans disclosed a condition which we had grave reasons to suspect had been deliberately imposed by the captor government, in which the small number of our people held by the enemy were scattered all over Germany in no less than twenty or twenty-five different camps. In some camps there was only one, or possibly two Americans, along with a number of Russians or Roumanians; in other camps there might be three or four or half a dozen. This isolation of our prisoners militated not only against their fair treatment and comfort and the peace of mind that might come from association with other prisoners congerial at least in the matter of a common language, but also against the expeditious delivery of the very necessary food and clothing parcels sent to the American prisoners of war by the American Red Cross from its headquarters at Berne. Furthermore, the wide separation of these prisoners of war made it extremely difficult to secure to them the periodical visits from the delegate of the neutral Protecting Power, in our case sometimes Switzerland and sometimes Spain. In the earlier stages of our discussions with the German delegation on this particular point they were inclined to attempt a compromise whereby prisoners of war should be grouped with others speaking their own language. This indeed would have been a marked improvement in the condition and state of our men, for it would have placed them in daily contact and association with British prisoners of war; but it would not have reached the standard which we were endeavoring to obtain in the matter of administration. For this reason we held to the contention that prisoners of war should be grouped as indicated in this article, *i.e.*, whenever possible, in camps of not less than 100 men from their own state of origin. The desirability of assigning every prisoner of war not an officer to a camp having a camp help committee is apparent on the face of it, since it is through the instrumentality of the camp help committees that the rights, privileges, and fair treatment of the prisoners are constantly kept to the fore and in a measure assured.

ARTICLE 34.—This article, forbidding the establishment of camps

exclusively for non-commissioned officers, although expressed in a single sentence of less than two full lines of print, is really very important. The general principle having been accepted by the belligerent governments that non-commissioned officers, prisoners of war, should not be required to perform manual labor in the same way as enlisted prisoners of war of lower grade, several commandants of German war prison camps tried first the expedient of cajoling, or coercing by roundabout methods, in order to make the non-commissioned officers *volunteer* for work; this expedient having failed to a large extent because of the dignified attitude of the British non-commissioned officers, the German authorities then hit upon the plan of establishing camps for non-commissioned officers only, and then under the guise of necessary camp work compelling these non-commissioned officers to perform all manner of manual labor. Hence the prohibition contained in this article.

ARTICLES 35-37.—These articles, providing for prompt notification of capture to relief societies and families of prisoners of war, require no explanation other than the statement that they are based upon the needs of the situation as developed during the four years of war.

Article 38 relates to the standard for housing and accommodating prisoners of war; it is couched in the German rather than the American construction for expressing the essential idea contained in it; but inasmuch as it covers the points desired by us we were constrained to accept it in this modified form. It was recognized that local conditions would not always, indeed not often, permit accommodations provided for prisoners of war absent from the main camp on working detachments, sometimes for industrial work, sometimes for agricultural work, to be on exact equality with those required for the main or parent camps. The real gist of this article, in itself a triumph, is contained in the provision that the standard of accommodations for the prisoners of war should be based on that of the troops or armed forces of the captor state. Throughout the negotiations the German delegates endeavored time and time again to force us to accept as a standard the conditions applicable to the civil population. This we declined to do, realizing that the condition of the

civil population in Germany was, in the important matters of housing, food and clothing, probably never so good as that of the captor (German) troops, also that it was probably growing worse from day to day and, furthermore, that it was subject to no specific limitations or requirements.

ARTICLE 39.—We also had to recognize that the representations made by the German delegates with regard to the character of the buildings or barracks in which prisoners of war in Germany were housed, to the effect that they were fundamentally different from buildings used for the same purpose by our military authorities in France or even in America, were worthy of consideration; for in Germany, where a large military organization has been maintained for many years, there are numerous barracks of the permanent masonry type, whereas many of our cantonments and all of our prisoner of war barracks would be of new and temporary construction, and generally wooden.

ARTICLE 40.—This article defines the rights and duties of the camp help committees in relation to the performance of the requirements of Article 39.

ARTICLE 41.—This article is almost in the identical words of Article 6, Hague IV, but it is made vitally different and infinitely improved by the addition of the words, "aptitude and physical ability." It is notorious that in the employment of prisoners of war at physical labor the German authorities had either purposely or carelessly put many a round peg into a square hole. Men of professional or clerical life had been forced to perform hard physical labor for which they were fitted neither in aptitude nor in muscular strength. It was to correct this abuse that we insisted on the inclusion of these words.

Article 42 forbids forced performance of any work directly related to the operations of the war, and also forbids either party to work prisoners of war in mines, marshes, munitions works, or blasting work in quarries. In the light of reliable information coming to us out of Germany, the mandatory requirements of Paragraph 1 of this article were insisted upon by our delegation. As to paragraph 2 of this same article, which corresponds to our original Article 2 of Section

IX, the German delegates very frankly and positively stated when this article first came up for consideration that they could not and would not accept any such prohibition. For this attitude they offered the explanation that they needed the labor, and also that inasmuch as their agreements with the French and with the British had not prohibited such labor on the part of prisoners of war, but had only required that physical examinations be held to determine the qualifications of the prisoners for this very hard work, any agreement with the United States at variance with the British and French agreements would place the German Government in a most awkward predicament. This question was brought to a head, however, in a special plenary meeting of the Conference in the course of which the chairman of the American delegation, in answering the objections of the German delegation to the adoption of this article, employed the following unmistakable language:

In regard to the question of work in mines, quarries, munitions factories, marshes, etc., we make the point that prisoners of war should not as a class be made to do especially dangerous work. The American Government has taken the stand, and intends to maintain it, that it will mete out to the German prisoners of war, and to other Germans in its hands, exact equality of treatment, no more and no less. In order—if American prisoners should be made to work, especially in mines and quarries—in order that this equality should be carried out, we wish to submit to the German delegation that the necessity would arise on our part to transfer the German prisoners of war to America and to put them to work in the mines and marshes there; and that we intend to do that if necessary. We will ask them, therefore, to reconsider this question and see if we can not come to an agreement on it.

The effect of this declaration upon the members of the German delegation was electric. They "sat up and took notice." One could imagine them seeing the vision of our transports returning from Europe carrying German prisoners who were not only to be employed at work in marshes and in coal, iron, and salt mines, but who were also to be exposed to destruction en route by German submarines. This article remained open for discussion until the eleventh hour of the Conference, we always maintaining that it must be adopted and the German delegation continually endeavoring either to forget

it or to sidetrack it or to draw its teeth. The fact that it is included in the final signed agreement indicates, of course, that it was eventually accepted by them. However, it should be said in this connection, that in order to save their own face, the Germans in the last days of the Conference requested (with the change in the military situation during the several weeks of the Conference their attitude, which in the beginning was one of *demanding*, had altered so that at the last it had become almost if not quite an attitude of *petitioning*) that the minutes of the final meeting should contain a declaration to this effect:

The German delegation declares that no general principle governing the utilization of prisoners of war is to be drawn from the provisions of the second paragraph of Article 42. It is not to be considered in any way an anticipation of an international agreement on the subject, nor as an interpretation of corresponding provisions of The Hague Convention on Land Warfare; on the contrary, the German delegation specifically invite attention to the fact that they have considered an agreement in the sense of the article referred to as possible only because of the actual present utilization of prisoners of war by both sides, and with a view to the termination of the current conference between Germany and the United States.

The American delegation takes cognizance of this declaration.

There is no doubt in my own mind that the German delegation were constrained to concede the point at issue because of the real and serious danger of loss that might be sustained by German prisoners of war through the operations of German submarines against American west-bound transports. In the discussions of the subcommittee we laid it before them very plainly that such a danger was only too real.

Another motive which actuated us in our insistence on the prohibition of prisoner of war labor in mines and marshes was based upon the positive information that, because they were far removed from periodical inspections by the neutral delegates or other authorized persons, and were in many cases employed by private individuals or corporations who were not held up to a high standard of responsibility by the German authorities, prisoners of war, especially British, French and Russians, in the hands of the Germans, had been sub-

jected to brutal and inhumane treatment, extending sometimes even to death from overwork in the mines and marshes of Germany itself or of invaded territory occupied by the German military forces. This knowledge made us firm in the conviction that a prohibition of this form of labor in respect to our own countrymen in the hands of the enemy was absolutely imperative.

ARTICLE 43.—This is a companion to Article 32; the only reason why it is separate from that article is that 43 refers primarily to work, while 32 refers to disposition after capture.

Article 44 concerns the character of compulsory work on the part of prisoners of war, the agencies for whom they may be required to work, and the safeguards surrounding them; it should be compared with Article 6 of Hague IV. The superiority of Article 44 in the positive provisions of the second paragraph is evident at a glance.

ARTICLE 45.—This article represents a slight change from Article 6 of Section IX of our original proposal. Although we had specified eight hours as the normal day's work, the representations of the German delegation that the ten-hour day was universal throughout Germany, and that the practical difficulty of working prisoners of war two hours less than free workers in the same locality were so great as to be virtually insurmountable, caused us to yield the point and to accept ten hours as the normal day's work. At the same time we made an informal declaration that, inasmuch as eight hours constitutes a normal day's work in the United States, the American delegation, considering that to be a proper day's work, was acceding to the representations of the German delegation only from a realization of the difficulties presented in adopting an eight-hour day. The requirements of Paragraph 2 of this article were based upon actual authoritative reports in the hands of our delegation which indicated the adoption of such requirements to be necessary, *i.e.*, that a full hour should be allowed for the midday meal and also adequate time and opportunity to attend calls of nature. There were reported instances of serious deterioration in the health of prisoners because of the denial of the latter right.

Article 46 covers a mandatory provision for a weekly day of rest, the same to be the calendar Sunday whenever practicable; it is in

large measure self-explanatory; as in the case of many other articles, however, we deemed it necessary that the provisions it contained should be specifically laid down in order that there might be no possibility of misinterpretation, whether inadvertent or deliberate.

ARTICLES 47-48.—These articles are necessary safeguards for the proper and considerate treatment of prisoners of war in relation to work, its character and surrounding conditions, and the ability of prisoners to perform it.

ARTICLE 49.—This article is an enumeration of certain personnel who might be said to be "neither fish, flesh, nor fowl."

ARTICLE 50.—This article, accepted after several days of editing and modification, was formulated in order to maintain the dignity of non-commissioned officers. Some of the German prison camp commandants were most ingenious in evading all the assumed or inherent regulations concerning non-commissioned officers; we therefore had no choice except to put down in black and white what we considered to be correct treatment of this class of personnel.

ARTICLE 51.—This article settles definitely the terms of compensation under which prisoners of war shall work. Simple as it seems, it caused a great deal of talk and discussion on the part of the German delegation, and was referred at least once to the central government at Berlin.

Article 52 stipulates the standard, in quality, quantity, and variety, of the ration to be furnished to prisoners of war; it also definitely acknowledges the obligation resting upon the captor government to furnish such ration. Excepting only the "submarine article," No. 16, this article, 52, brought forth more objections, involved more discussion, and was rejected point blank by the German delegation more often, than any other article in the agreement. We came to consider it almost an old standby to which to return whenever business at the council table seemed to be slacking up in other respects. Counselor von Keller's keenest reasoning and finest oratory were devoted to the explanation as to why the adoption of this article was truly impossible from the German point of view. As in the case of the housing and clothing of prisoners of war, so in this case of rationing, the German delegation were insistent that the standard set



should be based upon the conditions applying to the civilian population of Germany. This we simply would not have, for the reasons before stated in the discussion of the housing problem. We knew from reliable reports coming out of Germany that the civil population were sadly wanting in certain necessary articles of food. We knew, further, that the food situation was becoming more and more critical for the civilian population with the continuance of the war, and that the element of the population last to suffer a reduction of food in either quality or quantity would most naturally be the armed forces. From the abstract point of view also, it seemed to us a compelling duty to provide beyond any peradventure of doubt that prisoners of war should be on the same basis in these respects as the national armed forces of the captor.

I still have a little feeling lurking in the back of my own mind that had there been a prolongation of the war with a prospect of German success, the German delegation would never have accepted this article in the terms that we insisted upon. At the time that they did accept it, the outcome of the war adversely to Germany was daily becoming more and more apparent. The German delegation seemed to divine that in the near future they would probably be without any American prisoners of war to whom they would owe any obligations whatever, and that, on the other hand, it would be well for their prisoners of war in American hands to be safeguarded by just this form of positive, definite provision for food. Under these new conditions, therefore, the adoption of the article strenuously opposed by them six weeks earlier would be all to their advantage.

ARTICLE 53.—This article, relating to the management of officers' messes and the utilization of food parcels coming to prisoners of war from outside sources, expresses definitely a procedure which, in its main features, was followed prior to its adoption. However, since the procedure was not positively required, but only permitted, our delegation took the view that it should be definitely laid down.

ARTICLES 54-59.—These articles are all the outcome of reports on unfavorable conditions in the prisoner of war camps in Germany, received officially through our Protecting Power, and all refer to food, its preparation, service, supervision, etc.

ARTICLE 60.—No comment is necessary, other than to say that because there was no specific provision in the general conventions for this privilege of outside-of-the-camp exercise, many prisoners of war in the German prison camps had been denied this very valuable form of physical recreation. Our idea was to get them away from the sight of the barbed wire limits, out into the woods and fields, to relax their minds as well as their bodies.

ARTICLES 61-62.—The e articles require no special note. They cover somewhat in detail the necessary arrangements for intellectual occupation and divine service—"soul-care," as the Germans have it.

ARTICLES 63-69.—The whole of Section 9, Medical Treatment, was the subject of a discussion which was rather more lengthy than combative. On this general subject there seemed to be very little real opposition on either side to the views expressed by the other concerning provisions desirable of adoption, but just how to express these provisions and how to apply them gave rise to no little talk across the table. Referring for the moment to Article 63, here again the point of making the armed forces of the captor state the standard of comparison of treatment for prisoners of war will be noticed. This point was not accepted without opposition on the part of the German delegation. Paragraph 4 of this article we insisted on because of reports that in some cases prisoners of war had been subjected to rough and inconsiderate mental treatment when they had not the money to pay for the necessary anæsthesia.

Articles 70-87 relate to the punishment of prisoners of war. The first article of this group, 70, reads in part in the same sense as Article 8 of Hague IV. Article 8 however, in the second sentence of Paragraph 1, contains a provision which in the actual practice of German subaltern officers and non-commissioned officers in charge of prisoners furnished a liberty of action which was grossly abused in a great number of cases. We had reliable information of most inhumane treatment of prisoners of war by captor officers and non-commissioned officers, or even by mere sentries, for alleged insubordination. In all of the phases of this general question of punishment of prisoners of war we believed it to be positively necessary to state specifically and in great detail exactly what might or might not

properly be done to the unhappy captives, and so in this and the following articles down through 87 will be observed details specified minutely. The provisions of this section were founded not only upon general principles of humane treatment, but also in nearly every individual case of detailed statement upon necessity growing out of the knowledge of gross abuses practiced toward prisoners of war by the German military authorities. For example, in the second paragraph of Article 75 is the provision: "Prisoners of war shall not be subjected to extreme heat nor cold." This was inserted because of information supported by irrefutable evidence that on occasions more or less numerous prisoners of war held by the Germans had been subjected to extreme heat and immediately afterwards exposed to extreme cold, the usual method being to confine a prisoner in an overheated room and then in the briefest possible interval to tie him up to a post or a tree on the snow-covered ground, scantily clad. In connection with the articles involving trial and punishment, it is only fair and just to record that the difficulties and conflicts of the constitutional or statute law in both Germany and the United States were evident in the discussions. On several occasions, when it seemed that we had practically come to an agreement upon some debated point, a little further consideration would show that while our Federal Government might commit itself in matters pertaining to the agreement so far as the Federal courts were concerned because of the final prerogative of the Chief Executive, it could not in any way bind the courts of the several States of the Union.

The *raison d'être* and the meaning of Articles 88-93, inclusive, are thought not to need elucidation. Our original Article 2 of Section XV required that deceased prisoners of war should be interred according to their respective religions. This provision seemed desirable, and doubtless was so in former wars wherein the denomination or sect of any particular prisoners of war might be determined, or at least inferred, with facility. Discussion of this subject, however, developed the fact that because of the numerical size and polyglot character of the forces engaged in the current conflict, their various nationalities and the diversity of their nominal religious beliefs, the practical difficulties attending the literal fulfillment of such a provision were

so great that it would better not be stipulated in rigorous terms but rather be left to the good faith and intentions of the captor authorities.

Articles 94-102 treat of the formation and composition of Camp Help Committees, together with the rights, duties, privileges, and authorities resting in them. A careful reading of these articles will discover the great value to prisoners of war derived from the existence of these committees. Under modern conditions of war captivity they are indispensable. In their practical operation they are vital not only to the physical and mental health and comfort of the prisoners of war to whom they are related, but also to the attainment of their rightful treatment and consideration, and the checking of abuses on the part of the camp authorities, principal or subordinate. A properly organized and administered camp help committee which is alive to its responsibilities and prerogatives can invariably, and always within the bounds of military respect and subordination, safeguard its fellow prisoners of war to a remarkable extent. In many cases, I believe, the camp commandant is more than glad to have near such a responsible agency as a medium of communication between himself and his staff, on the one hand, and the prisoners of war under his charge, on the other.

The experience of Minister Garrett, our chairman, as a neutral delegate inspecting German camps for British and French prisoners of war prior to our belligerency had demonstrated to him the overwhelming urgency of providing in our prospective agreement for the liberal extension of the authorized functions of the camp help committees. His strong convictions on this subject appealed instantly and forcibly to the other members of our Commission, engendering an earnest resolve on our parts to contend insistently along these lines at the council table.

ARTICLES 103-117.—It has been frequently stated, and in our estimation the statement has been wholly confirmed by the direct reports of neutral inspecting delegates or by other information of reliable character, that but for the food and clothing parcels sent to them by their home people or governments through the agency of the authorized relief societies (principally the National Red Cross) the prison-

ers of war belonging to the Entente Allies and the associated United States would literally have starved or frozen to death in captivity. While admitting in theory the obligation of the captor government to feed and clothe adequately all prisoners of war in its hands, the German Government, resting on the excuse that the blockade precluded the fulfillment of this obligation on the part of that Government, deliberately or negligently, but in either case utterly, failed to provide any except the barest of nourishment and covering garments.

In respect to the provision made for our prisoners of war in the hands of the enemy, the number of whom attained an approximate maximum of 4,700, the work of the American Red Cross, operating from its central establishment at Berne, cannot be overestimated. It is enough to remark in this connection that the several camp help committees were the receiving and distributing agencies of the American Red Cross at the camps.

Articles 121-123 treat of a subject new to the hitherto recognized laws of war relating to prisoners of war. The Protecting Power of a belligerent is an agency of modern conception based upon the good offices of a neutral as a medium of quasi-diplomatic intercourse between warring Powers. In the existing struggle at arms, owing to the alignment of the nations of the world on either one side or the other, the number of available neutrals has been limited to a degree; the principal non-participants being The Netherlands, Switzerland, Spain, Denmark, Norway, and Sweden. From a very small beginning, when the delegates of the neutral Powers representing the interests of a particular belligerent were received as only on sufferance, being without any conventionally established rights or prerogatives entitled to respect and consideration by the enemy belligerent, a beginning which was merely the entering wedge of a tolerated practice, there has developed by rapid stages a definite system, openly recognized and accepted, wherein and whereby the condition, care, handling and treatment of prisoners of war, captives whose lot must needs be by the very nature of their situation always, even at best, in a large measure an unhappy one, are constantly under the surveillance of an impartial neutral inspector-delegate selected by his government

with especial regard to his fitness for the duty required. It was not ever thus in the past, nor even in the earlier stages of this war. Misunderstanding of their mission, suspicion of their neutrality, and a general sentiment entirely natural to military governments averse to permitting outsiders to interfere in any matters of administration, rendered the task of pioneer delegates of the Protecting Powers a peculiarly difficult one. While our country was yet neutral, Minister Garrett, as a delegate of the Protecting Power, was charged with the representation of British and French interests in respect to prisoners of war of these two nationalities held in German custody. The experiences undergone in this work by himself personally and by his authorized assistants were so full of discouragement and disappointment, involving not infrequently evasion, obstruction, and occasionally even downright rebuff by the military authorities (often subalterns) at the prisoner of war camps, that there had been made upon his mind an impression so vivid and permanent as to originate a fixed determination to embody in our convention with the Germans such provisions, definite, explicit, comprehensive and mandatory, as are found in these articles under immediate consideration.

ARTICLES 124-132.—As will easily be seen, these articles are concerned with the question of the payment of salaries to officers and others classed as officers while in the status of prisoners of war. In all of its essential elements this section is practically identical with a *modus vivendi* on the same subject which was about to be concluded between our Government and the German Government through the medium of diplomatic correspondence by way of the Spanish and Swiss foreign offices at the time when our dual conference was determined upon.

It will be recalled that Hague Convention IV, Article 17, provides as follows: "Officers taken prisoners shall receive the same pay as officers of corresponding rank in the country where they are detained, the amount to be repaid by their own government."

At the commencement of our participation in the war a considerable number of German naval officers who had been in our custody as internés automatically became prisoners of war. Some of them were under the immediate charge of the Navy Department, others

had already been turned over to the War Department. The question straightway arose concerning the rates of pay to be granted to these officer prisoners. Inasmuch as the State Department had uttered a pronouncement to the effect that the Government of the United States considered that the conventions of The Hague and of Geneva were not of themselves binding upon our Government, but that the Government would in general be guided by the underlying principles of those conventions, the War Department took as its guide in the matter of salary payments Article 17 of Hague IV; and the rates of pay therein prescribed were continued in their application to the German officers, prisoners of war, from the date of their capture during some six or eight months. In the meanwhile our Government was informed that the German Government had made no provision whatever for paying any salary to American officers prisoners of war in German hands. After some months of fruitless negotiation, involving exchange of numerous notes on the subject, without obtaining any satisfactory assurance from the German Government, our Government directed the stoppage of all salary payments to German officers in our hands, from and after November, 1917. During the first half of the year 1918 exchanges of proposals between the two governments in relation to this subject resulted in nearly reaching an agreement in effect the same as that which appears embodied in the articles under present study. It is considered that the present arrangement, whereby a flat rate of pay is authorized, is much to be preferred to the old arrangement indicated in The Hague Convention, for the simple reason of the marked inequality in amounts of pay to corresponding grades allowed in the several countries. Also we deemed it to be very advisable to state definitely just what persons should be entitled to pay and just what pay they should be entitled to receive, rather than to have the matter more or less dependent on comparisons and interpretations.

ARTICLES 133-135.—The provisions of these articles, which concern transfers from one prison camp to another, the reunion of relatives who are contemporaneous prisoners, and so forth, are really more important than appears at first glance. I think that if the reader should state each one of them negatively it would speedily be borne in

upon his mind that the statement of their importance is not overdrawn. As with the case of many other provisions inserted in this agreement, so with these, our commission felt that nothing essential or important should be left to inference.

ARTICLES 136-138 require no explanation.

ARTICLE 139.—In considering any definition of prisoners of war and of the classes of persons who should properly be included in this category, it is interesting to reflect upon the changes in the conception of the condition of prisoners of war wrought within the last decade or so. In former days and in former wars it was generally thought that the lot of a prisoner of war was not to be envied in comparison with that of the civil population of invaded or occupied territory, and that it was greatly to be desired to be and to remain exempt from capture. In this latest great war, however, the abuses and ill-treatment of civilians not ordinarily classed as prisoners of war have been such as to bring forth a marked change of sentiment. It is now considered highly desirable that every person, male or female, liable to be taken by the enemy, should have, as far as possible, the definite specified status of prisoner of war so that there may be no question as to rights, duties, privileges and immunities.

ARTICLES 140-150.—These articles provide for the prompt return to the jurisdiction of their own state of origin of the sanitary personnel serving in connection with its armed forces. Under the old conventions, these persons may not properly be classed as prisoners of war, but should receive a degree of immunity appropriate to their humane profession and activities. It was to insure immunity in this respect that the definite provisions of these articles were adopted. In all fairness it should be said that our opponents at the council table showed every evidence of a genuine desire to agree with our views in relation to the sanitary personnel. In one respect, however, the German delegation desired an extension of immunity to which we could not accede. This involved the inclusion in the class of sanitary personnel of *all German doctors and clergymen resident within the United States*. The German Government's request in this particular had been denied in diplomatic correspondence prior to the assembling of the Conference, and our Commission, thoroughly convinced of the



undesirability of repatriating the vast number of German doctors and clergymen in the United States, who, by the very nature of their respective professions were in position to obtain and to utilize secrets of possible great importance, stood out against the German suggestion. As to the pay of the sanitary personnel while in the hands of the enemy, it will be noted that in the third paragraph of Article 148 having reference to the pay provisions of Section 17, the stipulation of Article 132 regarding reimbursement by the state of origin at the close of hostilities were omitted. This omission was by design and was based on the theory that sanitary personnel working with and for the enemy are entitled to compensation at the expense of such enemy for services rendered.

ARTICLES 151-172.—I do not feel free at the present time to examine and expose in detail the reasons, arguments, requirements, and concessions contained in the provisions of these articles treating of civilian citizens and civil prisoners. They represent the maximum that we were willing to concede and less than the minimum that the Germans hoped and expected to obtain. The mutual situation in relation to the civilian question was altogether one-sided and unsymmetrical. Our best and most reliable advices put the number of American citizens (civilians) in Germany at a figure round about 2,100; while the number of German civilians under the jurisdiction of our Government was, in round numbers, nearly 1,800,000. The German delegation produced figures and endeavored to convince us that there were in Germany some 7,500 American civilians whose lot would be vitally affected by provisions for repatriation, or internment in a neutral country. There is no doubt that they raked the German Empire with a fine-toothed comb in order to round up so many Americans or quasi-Americans. While we were skeptical to the point of unbelief in relation to this figure, all that we could do diplomatically was to politely express a mild surprise that our information concerning this subject was so imperfect. As a matter of fact we believed it to be definite and thoroughly good. It is highly probable that in order to augment their "trading stock" the Germans had included in the category of American citizens (civilian) in Germany every undesirable resident who was acquainted with the American language or who had any

American affiliations and could by the extremest stretch of a willing imagination be vested with American citizenship in spite of the rigorously restrictive German laws concerning transfer of citizenship and allegiance through the process of naturalization. In order to spike this particular gun we inserted Article 161. Read it and note the limiting effect of its terms—"no dumping permitted."

During the discussion in plenary session in connection with this section of the agreement an interesting colloquy, illustrative of the opposing attitudes of mind and points of view, occurred, the spokesmen being Prince von Hohenlohe for the Germans and Mr. Davis for our Commission. I take the liberty of reporting it verbatim, the German version in translation, of course:

*Prince von Hohenlohe:* . . . The points upon which I have enlarged will, no doubt, occupy our attention for a considerable time to come, but I feel obliged to point out now that there is one other question the settling of which is included strictly in the German delegation's mission. I am thinking of the betterment of the fate of civilian prisoners, who, without participating in the war, are suffering as innocent victims thereof. The latest conferences which have met to discuss the question of prisoners have in consideration of this point occupied themselves earnestly with the lot of civilian prisoners, and they arrived at the conclusion that the internment of civilians should once for all be abolished. I especially direct attention to the agreement reached in April between the German and French Governments, the wording of which is as follows:

"The internment of civilians of one party in the territories of the other or in the occupied territories shall in future not be allowed."

In the same way the German and British Governments have agreed, at The Hague, that the civilians of both parties who, on the day the agreement came into force, might be in the power of the other party (officers and members of crews of merchant ships included) might, if they wished it, and without consideration of age or sex, be repatriated. I cannot help thinking that what was arrived at in the agreements with France and England should also be agreed on, with some good will from both sides, in the present negotiations.

*Mr. Davis:* Mr. President—In the matter of the civilian proposals, the American delegation has considered the proposal submitted by the German delegation, particularly with reference to the abolition of internment, and has reached the definite conclusion that an agreement with the German proposal is distinctly outside the powers which the American delegation possesses. The proposal, in effect, not only changes a rule of international law as we understand it, but also

counters on a statutory policy of the United States which has been in existence for a great many years. Such internments as have taken place in the United States have taken place under a statute passed by the Congress of the United States in the year 1798, which has been upon the statute books from that date to this time; and the American delegation is clearly of the opinion that the German proposal lies not only outside of their powers but also outside of the scope of the present conference, as we understand it. That being true, it seems to the American delegation hardly worth while at this time to take into consideration the reasons why internment should or should not be resorted to. We have, however, thought it might be worth while to make some remark during the course of this conference upon the extent to which internment has been resorted to in the United States during the present war. The last census was taken in the year 1910. There is no recent census showing the actual number of Germans, Austrians, or Hungarians, subjects of the Central Empires, held resident in the United States; but the estimates show that there are now resident in our country subjects of the Imperial German Empire, 1,800,000 (I employ only round numbers); 2,700,000 Austrian subjects, and 1,700,000 Hungarians. Registration has been had of all German males over the age of 14 years, and 260,000 have been registered; and, while registration is being made of all German females over the age of 14 years, it is assumed that the amount will result in a corresponding total. There were interned up to August 10, 1918, of this vast number, only 1,814 persons. This excludes, of course, the crews of merchant ships, who number, I believe, some 2,100 persons.

It seems to me, Mr. President, in view of the very definite position of the American delegation on this subject, and what we believe to be the limitations under which we are acting, that it is unnecessary for me to do anything more than to say, as I have stated, that it is outside the scope of our powers; and I therefore suggest that we return to the consideration of our own proposal, and I ask that that proposal may be taken up and considered by the German delegation as the basis of our agreement.

#### GENERAL PROVISIONS.

The meaning and application of the several articles falling under this heading are fairly obvious; it may not be out of place, however, to insert a few remarks in relation to certain of them.

ARTICLE 177.—As may be surmised, this article was adopted in order not only to prevent any narrow and restrictive interpretation minimizing the benefits properly accruing to prisoners and detentioners under the express terms of the agreement, but also to encourage all liberality of treatment within proper limits; ever looking to the

amelioration of the lot of those held within the double lines of barbed wire, and to brace up that class of prison camp authorities who, although perhaps possessing good and generous intentions, yet lack the backbone essential for the inauguration and administration of camps operated along lines of humane progress and reform.

ARTICLE 178.—In all that relates to the friendly offices of the Protecting Power as the go-between, the customary procedure flows through the channel of the embassy or legation of the Protecting Power at or near the seat of government of the enemy Power. A very little reflection upon the peculiar situation of the bulk of the German prisoners of war held by the United States, they being kept in France more than three thousand miles distant from their protecting embassy of Switzerland at our own national capital, will bring out the reasonableness of this article, which provides for a special delegate, situated in France, representing Germany's Protecting Power in her relations with the United States.

ARTICLE 181.—Our Commission would have been content to submit differences of opinion as to interpretation to the single judgment of a Swiss public official as umpire, permitting the two parties to the agreement to plead their respective causes before him through representatives not empowered to vote on the issue. An official copy of the agreement and all the official minutes of the proceedings of plenary meetings are deposited in the Swiss archives and are readily available for reference and study. Furthermore, the most likely appointee as referee in such a contest would be either M. Dinichert, who presided at all of the full meetings and at the greater part of the subcommittee meetings and who thereby possesses a most intimate knowledge of the discussions and arguments leading up to the adoption of each article, whether these discussions and arguments be officially recorded (as in the reports of the full meetings) or merely fixed in his retentive memory trained to note, perceive, analyze and store away therein all matters presented to it; or, failing M. Dinichert, one of the several of his trained secretaries of high capability, officially attendant upon the meetings of the Conference. But the Germans desired the article in this form, and really there is no substantial objection to it. Had there been such an objection we would naturally not have agreed to it.

It does not matter whether two contesting parties be represented each by a *member* on a three-man joint commission or whether their representatives be merely attorneys at court; the outcome will depend upon the neutral, since these representatives will always differ from each other in their points of view and in the judgment advocated, and the final decision will naturally rest with the third member.

Article 182, which forbids all forms of retaliation and reprisal except after ample notification, should be carefully compared with Article 58 of the original German proposal, which reads as follows:

ARTICLE 58.—Measures of reprisal, taken by one party against members of the other party, shall be executed, when they are contrary to international law or the agreements existing between the two parties, only after the lapse of at least one month subsequent to their notification.

The notification must be sent simultaneously to the proper diplomatic representative and to the Swiss Government.

The lapse of time mentioned in the preceding paragraph shall count from the day on which the notification of the measures reaches the Swiss Government.

Appearing at first sight to embody the same ideas, they are, in fact, very different. Our contention from the very start, as indicated in our original Article 8 of Section XVI, was that *no* measure of retaliation or reprisal of any character whatsoever should be undertaken or carried into effect without previous and sufficient notification to the government of the prisoners against whom the measures were contemplated. The Germans contested this view every time this article was brought up for discussion in a subcommittee meeting. They claimed that because this same provision as suggested by them had been incorporated in the agreement concluded with Great Britain and in that with France it should be good enough for us. In this point of view we could not concur. It takes no specially trained legal mind to discover and point out that the terms of the German article are susceptible of misinterpretation, willful or otherwise, almost unlimited in character and extent. The fact that the article as finally agreed upon is almost literally the same as that proposed by us indicates that we did not yield in our firm stand on this subject. It does not, however, show, and there is nothing recorded which does show, the obsti-

nate fight at the council table over the principle involved. I find myself still at a loss to account for the opposition of the German delegation to our proposal in this regard. Every article in this agreement is, as has been mentioned perhaps several times heretofore, entirely reciprocal in its operation; and why the Germans should not have been glad to provide against any form of unnotified retaliation or reprisal on our part against their nationals as well as to agree to the same provisions on their part concerning our nationals, I can not explain to myself; except, perhaps in this wise, that at the time of the beginning of our negotiations they were still very hopeful of military ascendancy giving them considerable superiority in freedom of action to treat pretty much as they might please the unfortunate captives in their hands, and that as the days went by and these hopes were shattered by the lost prospect of military advance, their ideas on this subject underwent very material change.

ARTICLE 183.—Reports from the inspecting delegates of the Protecting Power from time to time indicated that in at least some of the German camps the prisoners were frequently not cognizant of the orders and regulations which they were expected to obey because information was given them in a language which they did not understand. For this reason we considered it necessary to provide specifically against any possibility of abuse in this respect.

Article 184 stipulates the publication and posting of the agreement in the several prisoner of war camps. The adoption of this article represents somewhat of a victory. The German delegation was not at all enthusiastic over the proposal. While inclined to agree outwardly that the scheme proposed was a good one and quite justifiable, at the same time they presented all manner of objections the removal of which demanded long, patient, and tenacious discussion. They were particularly averse to the publication of such articles as the "submarine article." Informally the German delegation agreed to our expressed intention to have the American Red Cross (which volunteered through its representative on our Commission to do so) send a pocket edition of the agreement, when ratified, to every American prisoner of war.

## ANNEXES 1-6.

These annexes are in the main detailed amplifications of the articles in the body of the agreement and do not require any specific explanation.

Our original proposal begins with a preamble containing three paragraphs. The first of these is in effect the expression of a pious wish in the form of a declaration, and we regarded it somewhat in the light of patting ourselves on the back; still, since such expressions of good intentions are regarded in some quarters as quite the thing, we decided to incorporate it in the first draft of the proposal. At the outset the German delegation objected to any form of preamble. They said that while the substance of the preamble was entirely agreeable to them, they did not consider that it had any part in the body of the agreement, and particularly that it should not head the document. The subcommittee agreed to let this objection go over to be taken up subsequently at convenience; and eventually the second and third paragraphs of the preamble were accepted by the opposite side and are embodied in the final agreement as Articles 179 and 180.

Section I of our proposal, "Definitions," elicited lively opposition from the other side of the table. Our German conferees failed to see the use of any definitions. They maintained that in all other agreements to which they had been parties it had not been considered necessary to adopt specific definitions, and that the context would always, or for the most part, show what was meant by any particular expression. We, however, just as stoutly maintained that definitions were very essential to the complete and accurate understanding of the terms of the agreement; that it was entirely immaterial to us whether these definitions came at the beginning or at the end of the agreement or in the course of it; but that inasmuch as some of them were of general application, it would be better to place together all of the definitions that might be agreed upon and indicate that they were of common use. So, with slight and, I believe, immaterial alterations from their original phraseology, these definitions will be found in Annex 7, except the definition of "Sanitary Personnel," which is covered by Articles 140 and 141. The last sentence of definition No. 1, "Prisoners of

war," was omitted by common consent as superfluous, since the general provisions of international law include the titular heads of government in this category.

Some little vagueness and misunderstanding had to be cleared away in relation to definition No. 2, "Officers," largely because of the fact that in the German armed forces some of the warrant officers are assimilated in rank to our chief petty officers, and also the Germans do not have the grade of appointed officer such as we have in a limited number of cases. Definition No. 3, "Non-commissioned officers," was deemed to be necessary for the reason that in the German army corporals are not so regarded, while the reverse of the case holds true in our army. Definition No. 4, "State of Origin," was a great stumbling block. What the Germans held up their sleeve in regard to this definition is not even yet clear to me, but they objected to it outright at the beginning of our conference, and only our quiet insistence on this point enabled us to gain it in the closing days of our negotiations. The original definition was so worded in order to cover and protect, among others, such of the members of our armed forces, both naval and military, as might not have completely established their American citizenship; furthermore, in view of the existence and the operation of the German nationality law, commonly referred to as the Delbrueck Law, and the persistent rumors and reports that Germany intended to treat as traitors any of the members of our armed forces who might be captured while still owing allegiance to Germany by German interpretation, we considered it positively essential to have a specifically definite conception of the state of origin so that our Government might stand on very firm ground in demanding for such captives treatment appropriate to prisoners of war. In the course of our lengthy discussions of this particular definition, the attitude of both of the governments involved was pretty clearly stated and was, I think, well understood. I am sure that had the prospect of a further prolongation of the war with a probability of German triumph been apparent, the Germans would have held out against accepting this definition. As the conditions lay at that time, we held more German prisoners than they held Americans; and it was rather strongly intimated to them that in the absence of a conventional agreement cover-



ing this question, any radical action on their part, that is, the German authorities, would necessitate suitable return action on the part of our military authorities in France.

Definition No. 5, "Valid and invalid prisoners of war," was also categorically rejected by the German delegation at the outset. One of their expressed objections was that the terms in which this definition was originally clothed were likely to cause panic and pessimism among prisoners of war who might be wounded or sick. Eventually the sense of this definition, couched in milder and less alarming language, was embodied in the annex.

For the purposes of this agreement only, a conventional definition of repatriation was adopted. The peculiar territorial situation of the armed forces of the two parties made it advisable to advance this definition in its terms as adopted, *i. e.*, return to military jurisdiction of the state of origin would, for the purposes of this war and this agreement, constitute repatriation.

This brief account of the conception, constitution, assembly, and performance of the American-German Prisoner of War Conference would be indeed incomplete without the expression of some small tribute to the cordial, helpful, and courteous co-operation of the Swiss Government officials.

In some respects our long-continued sojourn in their midst, along with thousands of "war guests," must necessarily have been at the very least inconvenient. During many days we occupied valuable office space in the Palais Fédéral, or Parliament Building; heat, light, and service were at our disposal day and night, as was also a liberal amount of round table equipment and stationery, an item in itself not inexpensive. Always the hours of convening and the duration of the committee meetings were accorded precedence over the official and personal convenience of the President of the Conference and his Secretariat. I feel that I would be remiss in the performance of a pleasurable duty did I not here and now give appreciative testimony to the keen insight into our proposals and sympathetic comprehension of our motives and ideals; boundless patience with our lengthy discussions and disputations; unfailing tact and ability in smoothing out

the rough places in the road of contentious argument and in discovering exits from seeming impasses; everpresent cheerfulness and strict impartiality in conducting our meetings; all of these things as possessed and exercised by the neutral President of the Joint Conference, Monsieur PAUL DINICHERT, Minister Plenipotentiary in charge of the Swiss Division of Foreign Affairs. I for one am glad and proud to have been associated with so fine a gentleman.

Although naturally far removed from actual daily contact with our labors by reason of his official preoccupation and the strenuous exigencies of his office, nevertheless President CALONDER gave frequent evidence of sincere interest in the progress of the Conference and threw all of his weight and influence towards bringing about a successful conclusion to the joint discussions of the belligerent delegations face to face across the council table.

The latter days of the Conference were characterized by a considerable degree of haste in the effort to iron out the wrinkles of difference and to finally formulate an agreement. Turkey had given up. Austria had caved in. Château Thierry, Belleau Woods and St. Mihiel were historical. Our soldiers were driving in the Argonne. Laon, occupied by the Germans, was being bombarded by one of our U. S. Naval Railway 14-inch gun batteries at a range of 41,000 yards. Metz was within range of another similar battery. And Admiral Plunkett had twice as many more of these great guns *en route* to the front. The German office of military intelligence surely knew these things and what they portended. Disquieting (to Germans) reports were leaking through from Germany and being published in extra sheets of the local Swiss papers. Our friends the enemy delegates on the opposite side of the board doubtless visioned the mural inscription, "*Mene, Mene, Tekel, Upharsin*," an admonitory sentence as true and applicable today as it was at the feast of Belshazzar.

Communiqués announcing the Franco-American military successes were displayed at frequent intervals throughout each day at the *Agence Radio*, a French subsidized news agency extremely popular in Berne and a rendezvous for Entente internés and others aligned on the side of right and justice. Surreptitious visits to the *Agence* fur-

nished to Teuton sympathizers accurate information coupled with cold comfort..

The impending break in Germany was reflected not only in the altered countenances of our German conferees, but also in their changed attitude towards many of the articles in our proposal. They knew or sensed what was coming.

In my notebook, under the date 12 October, I find the following entry:

Mr. Z. told me today—he is the one who gets for us news “made in Germany”—that the Germans are ready to accept President Wilson’s terms no matter what they are, and are only hesitating to say so while they find some method to guarantee themselves that if they retire within their borders the Allies will not follow them and invade Germany.”

This was prophetic to no small degree.

Two days before the signing of the armistice, the Conference had reached agreement on the articles to be adopted; but unfortunately a general strike throughout Switzerland prevented the printing of the accord, wherefore we were not able to hold the final session for consideration and signature.

The armistice became effective at 11.00 a. m. of Monday, the 11th day of the 11th month of 1918. At 9 p. m. of the same day the closing act of our Conference took place in the Parliament Building at Berne. Monsieur Calonder had intended to preside at the dissolution, as he did at the formation of the Conference; but affairs of state of great moment imperatively demanded his presence at the Conseil Fédéral, then in almost continuous session. A general strike was on, involving the railroads, posts, and telegraphs, all federalized; troops had been mobilized by auto and camion and were bivouacked in the squares and market places of Berne—indeed in all the cities of northern Switzerland; the Parliament Building was heavily guarded on all sides; the tramp of soldiers within and without and the clatter of horses’ hoofs on the flagged pavement of the Bundesplatz, just under the windows of our assembly room, came to our ears even as we gathered together for the final dramatic meeting of the Conference; the Bolshevist peril, which had insidiously entrenched itself in Switzer-

land, the model republic-democracy, during the years of turmoil and strife surrounding that fair land, had to be met and defeated.

Would that I possessed the gift of word and pen to describe that last meeting in its impressive setting. It did not last very long. Monsieur Dinichert presided. For and in the name of the absent President he raised the curtain for the last act.

More than ever was I thankful that I was not a German.

Five copies of the completed agreement, in parallel texts of English and German, were signed by the Commissioners of the two Governments. There were two copies for us, two for the Germans, and one for the Swiss archives, this last being the official copy for reference in case of future need. The signing began at 9.15, requiring about twenty minutes for completion. Then Monsieur Dinichert made a short address of adieu, to which Prince von Hohenlohe and Minister Garrett, in turn, responded briefly, but with feeling. At 9.57 p. m. the Conference was declared adjourned *sine die*.

Across the table we exchanged bows of formality with the German delegates. We did not shake hands with them. We felt towards them no spirit of fraternity, not because of their individual personalities, but because of the system and the government they were representing and the practices for which they had stood and would, if victorious, continue to stand.

And so the Conference ended, having extended over a period of almost seven weeks.

Our leave-taking of M. Dinichert was most cordial; and deep in our hearts we wished for himself prosperity and for his country "a happy issue out of all her afflictions."

I am by no means sure that this agreement will soon or even ever be ratified by our Government;<sup>2</sup> in the opinion of some, ratification would be in serious conflict with the terms of the existing armistice; but this I believe, that ratified or unratified, it will prove to be a document of great referential value in future negotiations concerning warfare.

Our daily subcommittee meetings were always formal, as the importance of their being and object demanded; they were always pre-

<sup>2</sup> Written December, 1918.

sided over by Monsieur Dinichert or one of his secretariat, a neutral; diplomatic courtesy characterized their procedure; they were often disputatious and argumentative to a degree; occasionally they were at high tension; but they were not always funereal and totally devoid of humorous features; not infrequently we smiled, and once in a while we laughed out loud, thus dissipating a surrounding atmosphere that threatened to become too highly charged. For example, our German conferees could not conceal their amusement over the "animate vectors" mentioned in Article 7, Section III, of our draft; by appearing to join in that amusement and good-humoredly yielding to their objection to that particular descriptive expression of disease carriers, we gained the point of incorporating the substance, if not the form, of this article in the agreement.

It is with a sense of no little satisfaction that we compare and check off side by side and item by item the original American proposal and the completed joint agreement. Not one single essential feature of the former fails of incorporation in the latter.

RAYMOND STONE.

NOTE.—The author has in his possession a quantity of original notes and memoranda, personal and official, pertaining to the Conference. He would be more than glad to discuss with any interested reader any particular point that may have been suggested by the foregoing account.

## DIPLOMATIC PROCEDURE PRELIMINARY TO THE CONGRESS OF WESTPHALIA

DURING the negotiations leading up to the Congress of Westphalia a considerable number of problems of diplomatic procedure arose which occasioned serious delays in the conclusion of peace. The convoking of a general peace congress of the majority of the European states was a new departure in international practice; and in view of the great differences of these states in religion, politics, interests and language it was necessary to reach preliminary agreements on procedure before the actual work of making peace could begin. These agreements were not easily and quickly made; and the eight or nine years of negotiations which preceded the Congress of Westphalia are a good illustration of the fact that the diplomatic practice of today is the result of an evolutionary process.

The *corps diplomatique* did not take form until the end of the fifteenth century; and for a century and more following its appearance, ambassadors and statesmen consumed a large part of their time in wranglings over the proper mode for conducting diplomatic business or the proper courtesies to be observed in international intercourse.

These wranglings and disputes were characteristic of the age. Form and ceremony had lost little of their mediæval significance. Consequently at a time when diplomatic precedents were in the making, and when the formalities and ceremonies of diplomatic practice had not become stereotyped, the foreign representatives of princes and republics were rightly cautious in taking any step which might result in a loss of the dignity or prestige of their respective states, or which might constitute an unintentional admission of the disputed claims of rival monarchs. The theoretical or ceremonial equality of states as now recognized in international law was by no means

established, and the contest for pre-eminence among the crowns of Europe embittered national feelings and embarrassed the work of diplomats. The Holy Roman Empire, whose jurists had so positively claimed for it a universal jurisdiction, was crumbling into smaller units; princes and estates within the Empire, technically subordinate but practically independent of the Emperor, added to the diplomatic confusion by their demands for direct participation in international affairs; while the situation was further complicated by the cleavage of religious dissensions, which divided the diplomatic field into two camps.

Thus questions of procedure in the first half of the seventeenth century offered an excellent excuse for any obstreperous state to delay peace negotiations. More than this, these questions were formidable obstacles to the conclusion of peace even among belligerents genuinely desiring to end a war.

#### I. GOOD OFFICES AND MEDIATION

The approved usage of nations has long sanctioned proposals by a neutral state to assist in the amicable settlement of the international disputes of other states. These proposals may be in the form of an offer of good offices, whereby the neutral state will serve simply as the medium for an exchange of demands between the disputing states. Or the proposal may go as far as an offer of mediation, which, if accepted by both disputants, may entitle the neutral state to preside over and direct the negotiations for a pacific settlement. Such is the precise distinction between good offices and mediation made by modern authorities on international law. The jurists of the seventeenth century, however, were not so explicit in the use of these terms. International law was in its infancy and the vocabulary of diplomacy had not yet assumed the accuracy and precision which was to characterize it in a later period. Legal scholars, like Hugo Grotius, who prided themselves on their classical learning, were loath to invent new terms not found in the Latin of Cicero and Livy, and consequently they employed a variety of words and awkward phrases to express ideas which a later generation were to condense into a single word with a technical meaning. Even in the time of Grotius

the diplomatic vocabulary had adopted the term *mediation*. But since the word was not to be found in the language of the classics, the learned author of *De jure belli ac pacis*, who as Swedish ambassador at the court of France made a practice of decorating his official correspondence with choice selections from the Latin poets, scorned to make use of the current expression, and employed such phrases as *conciliatio*, *arbitrium*, *ad reconciliandos*, and *pacificationis negotium*, without maintaining any difference between them.<sup>1</sup>

On the other hand, Bogislav Chemnitz, whose celebrated history of the Swedish intervention in Germany was published in the year 1648, and who made frequent use of the word *mediation*, appears to have discriminated between an *accepted* and an *unaccepted* offer of the diplomatic services of a third state in the settlement of an international dispute. The former act he called an *interposition*; while, if the offer was accepted, the ensuing process was called a *mediation*.<sup>2</sup> As to the phrase *good offices*: This term is found in the diplomatic documents of the Thirty Years' War, but the jurists of the seventeenth century made no effort to set it off from mediation.<sup>3</sup> Perhaps

<sup>1</sup> *Rikskansleren Axel Owenstiernas Skrifter och Brefveämling: Grotii epistolæ ad Owenstierna*, II, ii, 104, 228, 257, 320, 338, 343; *Hugonis Grotii epistolæ* (Amsterdam: 1687), ep. 496, 636, 671, 722, 745, 754. Grotius confused arbitration and mediation in his *De jure belli ac pacis*, lib. II, cap. xxiii, 7-10; lib. III, cap. xx, 46-49.

<sup>2</sup> Chemnitz, *Königlichen Swedischen in Teutschland geführten Kriegs* (Stettin: 1648), I, 28, 33; II, 28, 29, 142, 938. The jurists of the age of Louis XIV and of the eighteenth century laid stress upon the matter of the acceptance of an offer of mediation as a prerequisite to the act. Compare Samuel Pufendorf, *De jure naturæ et gentium* (1672), lib. V, cap. xii, 7; Johann Wolfgang Textor, *Synopsis juris gentium* (1680), cap. xx, 51; Abraham de Wicquefort, *L'Ambassadeur et ses Fonctions* (1682), II, cap. xi; Francisco Schmier, *Jurisprudentia publica universalis* (1722), 307; Nikolaus Hieronymus Gundling, *Jus naturæ ac gentium* (1751), cap. xxiv, 45; and his *Discours über das Natur- und Völker-Recht* (1734), cap. xxxv, 144; Johann Gottlieb Heineccius, *Elementa juris naturæ et gentium* (1738), lib. II, cxxxi; Johann Justin Schierschmid, *Elementa juris socialis et gentium* (1743), 551; Christian Wolff, *Jus naturæ methodo scientifica pertractatum* (1741-1748), V, 923; Henrici de Cocceji, *Grotius illustratus seu commentarii ad Hugonis Grotii De jure belli ac pacis* (1744-1747), II, 662; III, 420; Samuel de Cocceji, *Introductio ad Henrici de Cocceji Grotium illustratum* (1748), 509.

<sup>3</sup> In the Treaty of Hamburg negotiated between France and Sweden in 1638,



they had enough to do in establishing the difference between mediation and arbitration. In the second half of the eighteenth century, Johann Moser pointed out, that the French Government in its correspondence of 1742 with Russia over the question of facilitating an amicable settlement of Russia's dispute with Sweden, had laid down the fundamental distinction between good offices and mediation which has since then been generally accepted.<sup>4</sup>

It was not for lack of offers of good offices and mediation by neutral nations that the Thirty Years' War was prolonged. In fact, it will not be too much to say that during no other war in the modern age has greater activity been displayed on the part of non-belligerent states in offering their services to effect a cessation of hostilities and to bring about preliminary negotiations for peace. Prominent among these peace-seeking powers should be named Denmark, Venice, England and the Papacy, all of whom were eager to play the rôle of mediator, if not the rôle of "arbiter of Europe." In 1629, when making his peace with the Emperor, Christian IV of Denmark undertook to

the Latin term *officia* (translated by *bons offices* in the French collection of Frédéric Léonard published in 1693) is employed with the term *opera*, but even here I do not believe that we find a conscious attempt to separate good offices from mediation. "VII. Et quia ad tractatus cum hoste instituendos et Rex Christianissimus et Serenissima Regina Sueciæ crebis amicorum Principium officiis invitantur, ne quid in se desiderari possit honestas pacis universalis conditiones numquam recusaturis, quantoeyus notum mediatoribus faciant sibi esse decretum de pace induciisve non nisi conjunctim agere, nihil absque mutuo consensu pacisci, et utramque causam simul et eodum momento pertractare, ut ipsi Mediatores suam operam et *sua officia* eo dirigant."—Hallendorff, *Sverges Traktater med Främmande Magter*, V, ii, 426. The Latin text is also found in Londerp, *Acta publica*, IV, 689; and Bougeant, *Histoire des Guerres et des Négociations qui précéderent le Traité de Westphalie* (Paris: 1767), I, 314. The French text is in Léonard, *Recueil des Traitez de Paix*, V; Bernard, *Recueil des Traitez*, III, 385; Dumont, *Corps Diplomatique*, VI, 161. Compare the following extract from the dispatch of Mazarin to d'Avaux and Servien on June 14, 1644: "Il n'omettra pas aussi d'assurer ledit Roi, que le Roi a resolu d'employer ses *offices* auprès du Duc de Transilvanie, pour empêcher qu'il n'entreprene rien contre la Pologne."—Le Clerc, *Négociations secrètes touchant la Paix de Munster et d'Osna-brug* (1725), II, 68.

<sup>4</sup> *Versuch des neuesten Europäischen Völker-Rechts in Friedens- und Kriegszeiten* (1777-1780), VIII, 422. Yet Vattel failed to observe the difference in 1758. Compare his *Droit des Gens*, liv. IV, chap. ii, 17.

induce the Emperor and Gustavus Adolphus to settle their dispute by negotiation.<sup>5</sup>

As a result, a conference was held at Danzig between Gustavus Adolphus and the Imperial plenipotentiaries; but this did not bring an amicable settlement, and soon the Snow King was marching with his army across Germany.<sup>6</sup> In the following years the King of Denmark repeated his offer of good offices and mediation; and, after the Peace of Prague, the Electors of Saxony and Brandenburg and the Duke of Lüneburg pressed their *interpositions* upon the belligerents, without much effect.<sup>7</sup> From other states came numerous offers of good offices and mediation, not the least hopeless and meddlesome of these efforts toward peace on the part of neutrals being the mission of the Duke of Arundel to Vienna in 1636 with the English King's offer to "interpose our mediation and credit with all the Princes and States of our profession in religion within the Empire to persuade them to submit to the Emperor, and accept peace."<sup>8</sup> Akin to the British fiasco was the presumptuous proposal of the Duke of Parma in 1637 to mediate between France and Spain—a proposal which Richelieu turned down in coldly polite words.<sup>9</sup>

Did the rejection of offers of mediation furnish legitimate grounds for offense to the Powers which had tendered their services? This

<sup>5</sup> Chemnitz, *op. cit.*, I, 28-36; Khevenhüller, *Annales Ferdinandeæ*, X, 1146-1147. G. Droysen, *Gustaf Adolf*, II, 125-139.

<sup>6</sup> The Powers in dispute at Danzig did not limit themselves to the mediation of Denmark alone. Note the following extract from the instructions given to the Swedish plenipotentiaries in April, 1630: "III. Inquirent deinde, quinam Mediatorum vice fungentur? Et si venerint e Dania, ab Electoribus Saxonie et Brandenburgensi aut Civitatibus Hanseaticis, denique a Regibus Gallie, Britannie aut ab Ordinibus Generalibus Belgii Legati, hi admittentur omnes, aut quotquot advenerint ab amicis. Nec repudiabuntur, si qui ab Electoribus Imperii conjunctim fuerint ablegati aut ab Infante Belgica vel Duce Bavarie. Quod si suos Rex Polonie præsto habuerit, suamque interpositionem obtulerit, ne illi quidem rejicientur."—*Rikskansleren Axel Oxenstiernas Skrifter och Brefveärling*, II, i, 588.

<sup>7</sup> Chemnitz, I, 318-319; II, 28-29, 116-118, 142-143, 231-232, 315-317, 435, 569, 619, 924-938, 1028-1046; Khevenhüller, *op. cit.*, XII, 260, 1722-1747, 2340.

<sup>8</sup> S. R. Gardiner, *History of England*, VIII, 158-159; Khevenhüller, XII, 1881, 2095-2141.

<sup>9</sup> Avenel, *Papiers de Richelieu*, V, 1022; VIII, 323.

question was not discussed by Grotius in his *De jure belli ac pacis*, published in the year 1625. But the jurists of the later part of the seventeenth century who built upon the foundations of Victoria, Suarez, Gentili and Grotius, and who found the history of the Thirty Years' War to be a rich storehouse of materials to supplement the archaic collection of cases and precedents from classical lore accumulated by their predecessors, had more to say on the subject. Pufendorf, the disciple of Grotius, attempted to establish the principle in his *De jure naturæ et gentium* (1672) that a belligerent state was under obligation to accept an offer of mediation; and more than this, that neutral Powers might rightly compel a settlement upon terms which they themselves should fix by joining forces against the state that refused their manifesto.<sup>10</sup> It was a project of *armed mediation* in German affairs, such as Pufendorf defended, that attracted the flighty ambitions of James I of England and his son Charles throughout the greater part of the Thirty Years' War; and perhaps it was the contempt which the Stuarts earned for themselves on the Continent by their ineffectual meddlesomeness that drew from Pufendorf the warning that only those princes should undertake "mediation by force of arms" who were able to compel submission to their award.

On the other hand, Johann Textor, in his *Synopsis juris gentium* (cap. XX, 50-61), published at Basel in 1680, took issue with Pufendorf and argued that no belligerent state was bound to accept an offer of mediation if it had good reasons for refusing. Furthermore, a refusal of an offer of mediation was not to be considered as a legitimate ground for offense or for a declaration of war. This position was also held by Wicquefort, whose celebrated treatise on *L'Ambassadeur et ses Fonctions* was published at The Hague in 1681.

## II. THE PAPAL AND THE VENETIAN OFFERS OF MEDIATION

When Richelieu changed his policy of covert alliances for one of open warfare, the Papacy made an earnest effort to persuade the Catholic princes to accept the mediation of the Vicar of Christ, suggesting that a conference of plenipotentiaries should be assembled

<sup>10</sup> Lib. V, cap. xiii, 7.

for this purpose. The Papal offer of mediation was accepted; and thereupon Urban VIII very skilfully cut short the diplomatic skirmishes as to the location of the proposed conference by himself naming Cologne. To this city in October, 1636, came Cardinal Ginetti as *legatus a latere* and commissioned to perform the office of mediator among the Catholic princes. The Empire and Spain hastened to applaud the zeal of the Holy Father and hurried their plenipotentiaries to Cologne in the hope of throwing upon France the odium of refusing the opportunity to make peace.<sup>11</sup>

The allies soon discovered that Richelieu at the outset had played a clever trick upon them by naming his brother, the Cardinal of Lyons, as the plenipotentiary of France. No appointment could have been more disagreeable to the Spaniards. The celebrated contest between the crowns of France and Spain was then at its height, and the rank of Alphonse de Plessis as a prince of the Church would entitle him to a place in the congress superior to that which the representatives of Spain could claim. The objections of the Court of Madrid to the Cardinal of Lyons were eminently legitimate objections in the opinion of seventeenth century jurists, but nevertheless they had the appearance of delaying the negotiations, and gave Richelieu the opportunity to pose as a great lover of peace when, after some delay on his part, he withdrew the appointment "in order to remove any obstacle in the way of the good work of pacification."<sup>12</sup>

The Papal offer of mediation had been conveyed to the Catholic princes through the nuncios at the European capitals; but, although the Swedish Queen had an ambassador at Paris, no invitation on the part of the Papacy reached this dignitary. Such an oversight was, of course, consistent with the Roman attitude toward the Protestant Powers. Before the days of Martin Luther, Innocent III had declared that the Head of the Catholic Church was the "supreme mediator over all lands on the earth"; but in the seventeenth century the Papacy

<sup>11</sup> Adam Adami, *Relatio historica de pacificatione Osnabrugo-Monasteriensi*, cap. ii, 8; *Mémoires de Richelieu*, IX, 71 seq.; Avenel, *op. cit.*, V, 222-223, 463, 521-522, 525-526; *Grotii epistolæ ad Oxenstierna* II, ii, 104, 169, 217, 236, 260, 268, 289, 337; Bougeant *op. cit.*, I, 261-264.

<sup>12</sup> Avenel, VIII, 309; *Mémoires de Richelieu*, IX, 74, X, 108; *Grotii epistolæ ad Oxenstierna*, II, ii, 260, 264, 268, 273, 284, 286, 294.

was still unable to reconcile itself to the accomplished facts of the Reformation, and at the conference of Vervins in 1598 the Papal mediator had threatened to withdraw if the English were admitted to the negotiations.<sup>13</sup> This discriminating policy was poorly adapted to the needs of Europe during such a vast conflict as the Thirty Years' War. France could not be expected to run the danger of ruining her alliance with the Protestant Powers by negotiating under a mediation which did not extend to her allies; and it was too much to ask of a proud and powerful nation such as Sweden to participate in an assembly where its presence was ignored by the chief mediator. Moreover, the attitude of the Papacy was a stumbling-block in the way of Richelieu's great ambition to compel the summoning of a universal peace congress in which the Protestant princes of Germany might have seats and there add to the confusion of the Hapsburgs.

The unfolding of Richelieu's scheme of a universal congress began in the spring of the year 1635, when High Chancellor Oxenstierna came to Paris in the interest of the new alliance between France and Sweden, which gave promise of repairing the losses of Nördlingen and the Peace of Prague. On April 28, Oxenstierna signed the Treaty of Compiègne whereby neither ally was to treat with the Emperor save jointly and with common consent.<sup>14</sup> But even at this time the Chancellor was far from being convinced that the alignment with France would bring good to Sweden and to the Protestant Powers in Germany, and that after all it might not have been a better policy to conclude peace with the Emperor, as the Duke of Saxony had done. The Regents of Sweden shared these doubts with Oxenstierna, and refused to ratify the Treaty of Compiègne for the reason that it bound the allies to refrain from separate negotiations with the Emperor.<sup>15</sup> Richelieu was therefore under the necessity of winning a more ardent Swedish approval of the French alliance. For this purpose he dispatched the Marquis de Saint-Chamond to the Chancellor

<sup>13</sup> *Registrum de negotio romani imperi*, ep. clxxxv; *Hugonis Grotii epistolæ*, ep. 709; *Grotii epistolæ ad Oxenstierna*, II, ii, 297.

<sup>14</sup> Hallendorff, *op. cit.*, V, ii, 318; Léonard, *op. cit.*, V; Bernard, *op. cit.*, III, 365; Dumont, *op. cit.*, VI, 88.

<sup>15</sup> Chemnitz, II, 775, 925.

and the Baron d'Avangour to the Regents with instructions to secure the promise of Sweden to relegate all peace negotiations to a general congress at which the allies might meet the Emperor with a united front.<sup>16</sup> In carrying out these instructions Saint-Chamond succeeded in obtaining from Oxenstierna a qualified acceptance of the proposal that the Swedes should join the French at the Congress of Cologne in treating with the Emperor. This half-promise was included in the Treaty of Wismar, signed on March 20, 1636.<sup>17</sup> For the moment it appeared as though an important step had been taken in the direction of a universal peace congress.

Another formidable obstacle in the way of the congress remained to be overcome. Could the hitherto unrelenting attitude of the Papacy upon the question of intercourse with the Protestant Powers be swerved in the interest of the peace of Europe? On July 5, 1636, the Cardinal of Lyons wrote from Rome to say that the Pope would not raise insuperable objections to the presence of the Swedes at Cologne, although their plenipotentiaries would be ignored by the Papal Legate, and their negotiations must needs be conducted through other channels.<sup>18</sup> While this arrangement indicated a concession on the part of the Holy Father, Richelieu was well aware of the fact that it would not satisfy the scruples of the Swedes. In his own mind he was convinced that the Papacy did wrong in not permitting its nuncios to treat with the Protestant Powers, that if the Papacy honestly sought to bring about a general peace by means of its mediation, then it was not enough for the Papal Legate at Cologne merely to tolerate the presence of the Swedish plenipotentiaries at the proposed congress, but that a formal invitation should be sent by the Pope to the Protestant belligerents. These views Richelieu expressed to the Holy Father through the French representative at

<sup>16</sup> Avenel, VIII, 286, *Mémoires de Richelieu*, VIII, 344.

<sup>17</sup> Avenel, V, 463. The fifteenth article of the Treaty of Wismar read: "Is eligatur tractatui locus qui æque commodus et tutus utrique sit qualis pro præsentis rerum statu videtur esse Colonia."—Hallendorff, V, ii, 371. The treaty as published in Pufendorf's *De rebus Suecicis*, lib. x, 14, reads the same, except the word *creditur* is in the place of *videtur*. Inaccurate summaries of the treaty are in Londerp, *op. cit.*, IV, 566; Léonard, V; Bernard, III, 375; Dumont, VI, 123.

<sup>18</sup> Avenel, V, 526.

Rome, and he also said the same things to the Papal Nuncio at Paris.<sup>19</sup> The formal invitation, however, was not forthcoming; and when Richelieu took it upon himself to request the Swedish Government to send plenipotentiaries to Cologne, the Regents replied that they had not yet been invited by the mediator. Accordingly on February 21, 1637, Richelieu instructed the French Ambassador at Venice to request the Republic to offer its mediation to the Swedes.<sup>20</sup>

The Republic of Venice acted upon the suggestion of Richelieu and tendered its services to Sweden, proposing that the Protestant Powers should submit to the mediation of its ambassador at Cologne.<sup>21</sup> To the Regents of Sweden this offer was not altogether agreeable. During the year which had elapsed since the signing of the Treaty of Wismar, the Swedish policy that ultimately led to the partition of the Congress of Westphalia into two separate conferences had already taken definite shape. The Swedes were alarmed, and not without cause, lest in any congress of European Powers they would have to play second fiddle to France. The apprehensions of the Scandinavians in regard to the dangers that would be met in a general peace assembly had been stimulated by reports from Queen Christina's representative at the Court of Louis XIII.

This ambassador was Hugo Grotius, who owed his appointment to the faithfulness with which the High Chancellor carried out one of the last wishes of Gustavus Adolphus; for the heroic Swedish king had been a careful student of the *De jure belli ac pacis* and had intended to give a suitable reward to its author before he died on the battlefield at Lützen. Throughout the negotiations over the Congress of Cologne, Grotius exerted himself to dissuade Oxenstierna from sending plenipotentiaries to the conference, reminding him of the humiliations which the representatives of Sweden would encounter in a city where the influence of the Pope was so great, and where his cardinal was so highly respected.<sup>22</sup> On January 12, 1637, Grotius wrote Oxenstierna, giving an account of an interview with Théodore

<sup>19</sup> *Mémoires de Richelieu*, X, 88-91; Avenel, V, 765-766; G. Fagniez, *Père Joseph et Richelieu*, II, 393.

<sup>20</sup> Avenel, VIII, 309.

<sup>21</sup> Pufendorf, *De rebus Succicis*, lib. ix, 63.

<sup>22</sup> *Grotii epistolæ ad Oxenstierna*, II, ii, 228, 262, 268, 272.

Godefroy, the French historian and juriconsult, who solemnly advised the Scandinavian Government against sending any plenipotentiaries to Cologne; for the town hated the Swedes, the Papal Legate was unfriendly to the Protestants, and the good feeling between the allies would be endangered by contests between their plenipotentiaries over the precedence of their respective monarchs.<sup>23</sup> Godefroy, it seems, took unusual pains to impress upon Grotius the fact that in any international congress France would demand the first place after the Emperor; and, since this distinguished historian had been appointed by Richelieu to the office of technical adviser to the French plenipotentiaries at the Congress of Cologne, Grotius had good grounds for believing that he spoke under orders from the cardinal himself and that the premier of France was far from desiring the end of the war.

In regard to the question of the pre-eminence of the crowns, Grotius pursued a line of conduct which tended to increase the dislike of the Swedes for negotiating in a general peace congress and which culminated in an episode forming one of the curious chapters in the history of the struggle for diplomatic equality in the family of nations. In his letters to Oxenstierna, Grotius frequently complained that the *corps diplomatique* and many of the French officials at Paris were not as ready as they should be in observing the formalities due to the ambassador of so powerful a state as Sweden.<sup>24</sup> At the beginning of the second year of his mission he became involved in a protracted quarrel concerning the dignity of the Kingdom of Sweden.

On February 18, 1637, at the public entry of the new ambassador from the Netherlands into Paris, the servants of Grotius attempted to place his coach in the procession ahead of the coaches of the two ambassadors from England.<sup>25</sup> A skirmish ensued in which the English, being the greater in number, were having the best of it, when the French master of ceremonies intervened and decided in favor of

<sup>23</sup> *Grotii epistolæ ad Oxenstierna*, II, ii, 297. Godefroy had a great reputation as a defender of the French King's claims to pre-eminence. He was the author of the *Mémoire concernant la préséance des rois de France sur les rois d'Espagne* (Paris: 1613), and of other works of similar nature.

<sup>24</sup> *Ibid.*, II, ii, 227, 277, 312, 466; iv, 72.

<sup>25</sup> *Ibid.*, II, ii, 312; J. L. de Burigny, *Vie de Grotius* (Paris: 1752), I, 391.



England. This affair was the occasion of several long interviews between Grotius and the British representatives, in which the dignity of the Kingdom of Sweden was gravely discussed.

The Earl of Leicester declared that Sweden's claim to pre-eminence was a rather novel pretension. Grotius made answer that the Swedish Kingdom was the most ancient and extensive in Christendom. Leicester referred to the classification of kingdoms by the Pope. Grotius retorted that nothing from that source had weight in the argument. When the English minister insisted that England had been converted to Christianity before Sweden, Grotius rejected the argument as one which might injure the spread of the Christian faith by impeding the conversion of the pagans and Mohammedans!<sup>26</sup> As late as July 26, 1637, the ambassadors were still continuing their conversations on this subject. Leicester contended that as Denmark and Norway yielded precedency to England, Sweden ought to follow their example. Grotius replied that whatever the Danes and Norwegians might do, made no difference in the rights of Sweden. Leicester asked how far back the antiquity of Sweden reached. Grotius answered that it transcended the most ancient annals; and that without going farther back it was sufficient to cite the testimony of Tacitus, who described the Swedish nation as very powerful in warriors and ships. The English minister declared that a long space of time had elapsed since Tacitus wrote, in which the pages of history had nothing to say about the Swedes. Grotius proved that they had been mentioned in every age by the chroniclers. He added that it had been a matter of some surprise to find that when the truce was signed in Holland the English permitted the French to be named first in the documents, while in the treaties which Sweden made with France there was always one copy in which the name of Sweden was put before the name of France. The conversation between the two ambassadors then touched upon the subject of a general peace congress. If every monarch claimed the precedency, said Leicester, it would be impossible for their plenipotentiaries to meet together in

<sup>26</sup> *Grotii epistolæ ad Oxenstierna*, II, ii, 314, 319; *Hugonis Grotii epistolæ*, 303, 306, 866.

one assembly. Grotius thought that a number of expedients might be devised to save the claims of each.<sup>27</sup>

Although the parleys between Grotius and the Englishmen appear to have been conducted with decorum and moderation, the learned representative of Sweden launched himself into a highly offensive quarrel with Dr. Renaudot, the editor of the *Gazette*. Renaudot had published an account of the battle of the coaches, in which the name of England was mentioned before that of Sweden. Grotius demanded that in another issue of the *Gazette* the name of Sweden be mentioned before that of England in order to square the account. Upon Renaudot's replying that he took orders from no one but the King and the Cardinal, Grotius retorted with unseemly anger, that unless the editor of the *Gazette* gave satisfaction he should feel to his sorrow that Sweden was powerful enough to secure justice!<sup>28</sup>

It was in the midst of the above-mentioned quarrels over diplomatic courtesies that the Venetian offer of mediation at the Congress of Cologne reached Sweden. The letter in which the offer was made, addressed the Queen as *Serenissima Regina Sueciæ*, although a month before its dispatch, Grotius had intimated to Oxenstierna that the Venetians were well aware of the fact that the only proper address to the Swedish Queen was *Serenissima ac Potentissima Regina Sueciæ*, similar to the formula which Venice accorded to the King of England.<sup>29</sup> The blunder in diplomatic etiquette committed by the Venetian Government thus furnished the Swedes with legitimate grounds for delaying their acceptance of the proffered mediation and Father Bougeant, the celebrated historian of the negotiations preceding the Peace of Westphalia, lays at the doors of Venice and Sweden a considerable part of the responsibility for the failure of the Congress of Cologne.<sup>30</sup> This verdict, however, is kind to the memory of the masterly Richelieu, whom the Spaniards and Imperialists at this time denounced as the one obstacle to peace in Europe. On his side, Richelieu was too clever a diplomat to allow the Emperor and Olivarez

<sup>27</sup> *Grotii epistolæ ad Oxenstierna*, II, ii, 376.

<sup>28</sup> *Ibid.*, II, ii, 316.

<sup>29</sup> *Ibid.*, II, ii, 320.

<sup>30</sup> *Histoire du Traité de Westphalie*, I, 263.

to foist upon France all the blame for delaying the peace negotiations at Cologne; and accordingly he exposed the game of the Imperialists by demanding safe-conducts for the plenipotentiaries of Sweden, Holland and the Protestant princes of the Empire. This opened a delicate question. The Spanish King was willing to grant safe-conducts to the Swedes, but refused to do the same by the Dutch, who were still considered as rebellious subjects. On the other hand, the Emperor was willing to give safe-conducts to the Dutch, but hesitated to accommodate the Swedes and the Protestant princes of Germany.<sup>31</sup> Quite rightly no Power was willing to send plenipotentiaries to Cologne without the proper passports, and thus the evasions of the Empire and Spain in this matter were enough to block the peace negotiations, while giving Richelieu the opportunity of complaining to the mediators that the good intentions of the Holy Father were made fruitless by the insincerity of the enemies of France.<sup>32</sup>

### III. MEDIATION ACCEPTED: THE TREATY OF HAMBURG IN 1641

The long series of attempts on the part of the English Stuarts to play the rôle of mediator in the Thirty Years' War came to a sorry climax in 1638, with the manœuvres of Charles I to arrange a conference at Brussels, in which he hoped to secure some concessions at the hands of the Emperor for his nephew in the Palatinate, while at the same time he was negotiating with Richelieu for an offensive and defensive alliance against the Empire.<sup>33</sup> Hereafter the diplomatic struggle centred in the city of Hamburg, where d'Avaux and Salvius negotiated a renewal of the Franco-Swedish alliance, and where the Imperial agents, Graf Kurtz and Conrad von Lützow, employed the

<sup>31</sup> Avenel, V, 463, 643, 844, 1014; VI, 256; *Mémoires de Richelieu*, X, 105-127; A. Cánovas del Castillo, *Estudios de Reinado de Felipe IV*, I, 393-396; Barozzi and Berchet, *Relazioni degli stati europei lette al senato dagli ambasciatori veneti*, II, ii, 306; Aitzema, *Saken van Staet en Oorlogh in ende omtrent de Vereenigde Nederlanden*, II, 423; A. Waddington, *La république des Provinces-Unies, la France et les Pays-Bas espagnols de 1630 à 1650*, I, 290-292; Le Clerc, *op. cit.*, I, 229; Pufendorf, *De rebus Suecicis*, lib. ix, 64; Adam Adami, *op. cit.*, cap. ii, 11-12.

<sup>32</sup> Avenel, V, 765, 820, 822; VIII, 309, 311, 315, 321, 322, 324.

<sup>33</sup> S. R. Gardiner, *op. cit.*, VIII, 375-378.

good offices of the Danish King to inveigle Sweden into a separate peace. The good offices of Saxony, Lauenburg and Waldeck were also employed in behalf of the Emperor, but with little success, for the French diplomacy had long before prepared the alliance against the onslaught of would-be mediators whose efforts for peace might advance the Hapsburg policy of *Divide et impera*.<sup>34</sup> The Treaty of Wismar, negotiated by Oxenstierna and Saint-Charmond in 1636, had provided that "no negotiations shall be begun for peace or an armistice with the Emperor or his allies, either directly or indirectly, secretly or openly, without the joint action and common consent of the King of France and the Queen of Sweden."<sup>35</sup> All proposals submitted through the good offices of neutral Powers were to be communicated without delay to the other ally, and no answers to such proposals were to be made except conjointly and with common consent of the allies. Two years later, when d'Avaux and Salvius negotiated the new Franco-Swedish alliance at Hamburg (March 8, 1638), the language of the treaty reads as if the allies were heartily weary of the numerous activities of the Powers who were offering their mediation. After renewing the promise to treat with the Empire only conjointly and with common consent, the allies now bound themselves precisely to acquaint the so-called mediating Powers with this promise and determination, in order that these "mediators may direct their activities and their good offices accordingly."<sup>36</sup>

The negotiations at Hamburg between the belligerents were conducted by exchange of messages through the good offices of the King of Denmark. At the beginning, the Imperialists proposed, as we have already seen, to treat with Sweden alone; but d'Avaux and Salvius insisted that the crowns of France and Sweden must negotiate together, and the King of Denmark was compelled to proceed in accordance with this demand.<sup>37</sup>

Nevertheless, d'Avaux had reason to suspect, much to his chagrin, that secret meetings between Salvius and the Imperial agents fre-

<sup>34</sup> Pufendorf, *De rebus Suecicis*, lib. xi, 67, 68; xii, 68, 69.

<sup>35</sup> Hallendorff, II, ii, 370.

<sup>36</sup> *Ibid.*, V, ii, 426.

<sup>37</sup> Pufendorf, *De rebus Suecicis*, lib. viii, 78; ix, 61; x, 68-73; xi, 62, 65; xii, 73-80; xiii, 83-90; Bougeant, I, 347-348, 402-406, 415-419, 447-448, 451-472.

quently occurred. Christian's representative at Hamburg, Dr. Lorens Langermann, who exercised the office of mediator, appears to have fully deserved the esteem of the negotiators. Under his mediation, the preliminary Treaty of Hamburg, providing for the convening of the long-awaited congress, was finally signed on December 25, 1641. In the preamble of this document, the negotiating Powers paid tribute to the great services of the King of Denmark in words which contained much eloquent truth, notwithstanding his well-known partiality, saying: "We make known to each and all interested, that after having attempted for several years to establish a mode of negotiating for a universal peace, and after having encountered numerous difficulties in our preliminary negotiations, at last, by the grace of God and by the *authoritative interposition* of the King of Denmark as Mediator, we have ordered these things as between us. . . ." <sup>38</sup>

#### IV. THE RIGHT OF REJECTION OF MEDIATORS

In his *Synopsis juris gentium*, published in 1680, Johann Textor proposed as a principle of international law that a Power which had accepted the mediation of another state reserved the right to reject the diplomatic agent appointed by that state to perform the office of mediator; and he cited the objection made by Louis XIV in 1675 to the appointment of Archbishop Guinigi as mediator at the Congress of Nymegen.<sup>39</sup> Another precedent taken from the period of the Thirty Years' War could also have been cited, namely, the recall of the Papal mediator appointed for the Congress of Westphalia in 1643.

The Treaty of Hamburg, which made the preliminary arrangements for the general peace congress, contained no provision in regard to the mediating Powers. It seems to have been tacitly understood that the Papacy would mediate between the Catholic Powers at Münster and that the King of Denmark would mediate between Sweden

<sup>38</sup> Hallendorff, V, ii, 501. The Latin text is also in Lünig, *Teutsches Reichs-Archiven, Partis specialis continuatio*, I, i, 399; Abreu y Bertodano, *Coleccion de los Tratados de España*, III, 651; Meiern, *Acta pacis Westphalicæ*, I, 8; Gärtner, *Westphälische Friedens-Cantzley*, I, 5, 10; Pufendorf, *De rebus Suecicis*, lib. xiii, 90; Bougeant, I, 472. French texts are in Léonard, III, 71; Bernard, III, 384; Dumont, VI, 231. A Dutch translation is in Aitzema, *op. cit.*, II, 759.

<sup>39</sup> Cap. xx, 56.

and the Empire at Osnabrück, while the good offices and mediation of the Republic of Venice would be continued in the future as in the past. In the meantime, Cardinal Ginetti, weary of his long and unfruitful mission at Cologne, had returned to Rome; and although Fabio Chigi, as Papal Nuncio, was acting in his place, the Pope commissioned Cardinal Rosetti as *legatus a latere* for the negotiations at Münster. This appointment was unfortunate; for, as Textor says, "no one is bound to consent to a mediator whom he holds in suspicion," and Cardinal Rosetti was far from enjoying the confidence of the French Government.<sup>40</sup> He had been a partisan of the famous beauty, the Duchess of Chevreuse, whom Richelieu banished from Paris in 1626 and who intrigued and plotted against him in almost every court of Europe; and he was also regarded as biased in favor of Spain as against France. So far as Mazarin's objections to Cardinal Rosetti were concerned, however, there may have been considerable truth in the accusation made at the time that the Premier of France counted on winning the favor of the mediator who would be appointed in Rosetti's place and who would owe his appointment to the French rejection of his predecessor. At any rate, soon after learning the name of the Pope's choice, Mazarin protested by letter to Cardinal Bichi, who was then on a mission for France at the Papal Court. Of course, the Pope was piqued, but nevertheless he was compelled to recall his nominee; and thereupon directed the nuncio at Cologne to appear at Münster for the opening of the Congress, while he showed his displeasure by withholding from Fabio Chigi the exalted rank of *legatus a latere* which Rosetti had enjoyed.<sup>41</sup>

The disputing states were aware that the Papacy could not be a disinterested mediator at every stage of the negotiations. The Holy Father was not well disposed toward the Protestant Powers; he was intent upon conserving the property of the Church throughout Europe; and he was interested in maintaining a balance of power in

<sup>40</sup> Cap. xx, 52. Likewise Wicquefort said: "Le Ministre Mediateurs doit estre aussi bien desinteressé que le Prince qui l'employe." *Op. cit.*, II, 161.

<sup>41</sup> Chéruel, *Lettres du Cardinal Mazarin*, I, xci, 190, 315, 546; Gärtner, *op. cit.*, I, 599; II, 440, 458; Meiern, *op. cit.*, I, 34, 62; *Relatione de Contarini*, in *Fontes rerum Austriacarum*, XXVI, 297; *Grotii epistolæ ad Oxenstiernam*, II, iv, 25, 74, 78, 90, 390; Bougeant, II, 2-3; Adam Adami, cap. iv, 4.

Italy.<sup>42</sup> Thus the presence at Münster of an additional mediator sent by the Republic of Venice was welcomed by the various belligerents, although the Republic—like the Papacy—was not in a position to perform the office of mediation in an altogether impartial manner, being also interested in the balance of power in Italy. In fact, Contarini received instructions from his government upon this point.<sup>43</sup> The scope of the two mediators at Münster was not the same. The mediation of the Papal Nuncio extended over the negotiations of the Catholic Powers, namely, the Emperor, the Kings of France and Spain, the Elector of Bavaria, the Dukes of Savoy, Lorraine and others. The mediation of the Venetian Ambassador had a larger field comprising not only the Catholic Powers but also the Republic of the Netherlands and the Protestant states of Germany. On the eve of the Congress, the Swedish Government made an attempt to extend the Venetian mediation over the conferences at Osnabrück in the place of the mediation of the Danish King.

The belated desire on the part of the Swedes to secure the mediation of the Venetian Republic, within four years after having practically rejected the offer of the services of this Power, involves the episode of the involuntary retirement of Christian IV as a mediator at the Congress of Westphalia—an episode which well illustrates the manner by which the complexities of the diplomatic situation were increased by the lapse of time. After the signing of the Treaty of Hamburg, on December 25, 1641, the King of Denmark had continued his services as mediator during the long wrangle over the ratification of this treaty and the exchange of safe-conducts. When at last these documents were delivered into the hands of the mediator by the various belligerents, the Danish King served as the medium for the vigorous protest of the Empire against the delay of the French in sending plenipotentiaries to the Congress. The Vienna Government had been prompt in dispatching its envoys to Westphalia.<sup>44</sup> On July 30, 1643, Graf von Nassau arrived at Münster, and Graf von Auersberg had already proceeded to Osnabrück. In

<sup>42</sup> Bougeant, II, 4; Meiern, I, 60; Adam Adami, cap. iv, 4.

<sup>43</sup> Bougeant, II, 4.

<sup>44</sup> Meiern, I, 36-37; Gärtner, I, 655-659.

the following month the representatives of Denmark reached Osna-brück, while the Venetian envoy and one of the Swedish plenipotentiaries reached the congress in the middle of November. These tardy arrivals were bad enough, but the delay of the French and Spanish delegations exceeded all bounds of diplomatic courtesy. Toward the end of February, 1644, the Imperial plenipotentiaries wrote to the Papal Nuncio at Cologne, who in the capacity of principal mediator evidently intended to be the last envoy to arrive at the congress, begging him to set out for Münster, since the French would never come unless they knew that he was on his way. A month after the writing of this letter, the French plenipotentiary, Count d'Avaux, made his belated appearance in Münster, followed two days later by Fabio Chigi.<sup>45</sup> A year had passed away since the ratification of the Treaty of Hamburg, and more than two years since the signing of that treaty. In the meantime, an event had occurred which brought an end to the mediation of the King of Denmark.

For a number of years the friction between Denmark and Sweden had been accumulating. The Danes saw a menace to their independence in the rapid expansion of the Swedish power; while, on the other hand, the Swedes were annoyed by the fact of the Danish control of the Öresund. Throughout the preliminary negotiations for a universal peace, in which negotiations Christian IV persistently played the part of the solicitous mediator, the Swedes complained that his jealousy of their expanding power had caused him to conduct the mediations in a manner far from impartial.<sup>46</sup> By the beginning of the year 1644 the two nations were at war, and Christian IV was no longer in a position to act as mediator, although it proved to be a painful process to separate him from that office.<sup>47</sup> The rupture between Sweden and Denmark hindered the negotiations, if it did not actually threaten the break-up of the Congress of Westphalia, for the Empire refused to accept the offer of mediation which the Vene-

<sup>45</sup> Adam Adami, cap. iv, 2, 3; Meiern, I, 32, 33, 38, 57, 58, 63, 186, 191, 195; Gärtner, I, 346, 496, 505, 660; II, 154, 155, 545, 569, 657.

<sup>46</sup> Pufendorf, *De rebus Succiois*, lib. x, 93; Chemnitz (Stockholm: 1856), III, i, 7; IV, i, 17. J. A. Friderica, *Denmarks ydre politiske Historie, 1629-1660*, II, ch. v.

<sup>47</sup> Meiern, I, 81, 179-182; Gärtner, II, 340, 356, 406, 431, 444; III, 456.



tian Republic tendered at this crisis, advancing the absurd proposition that the King of Denmark had been commissioned to preside over the entire negotiations at Osnabrück and therefore could not be displaced by another!<sup>48</sup> Considerable time was consumed in haggling over this point, concurrently with the long controversy at Münster over the form of the credentials of various plenipotentiaries; but in the end the proposal to negotiate in writing without a mediator was adopted.<sup>49</sup> Thus was removed one of the final obstacles to the opening of the negotiations directly bearing upon peace, and on November 23, 1644, the Swedish Ambassadors received the first proposition of the Emperor as a basis of the peace treaty.

#### V. CONGRESS: ITS ORIGIN AND MEANING

A congress is usually defined as a formal meeting of the plenipotentiaries of several states for the purpose of negotiation. In modern treatises on diplomatic procedure it is customary to begin the list of the great European congresses with the Congress of Westphalia; and the student of international law, unless he is cautious, will assume that in 1644 a new diplomatic practice sprang full-fledged into being.<sup>50</sup> This, however, is not a correct view, for although the Congress of Westphalia was the first assembly of plenipotentiaries from nearly all of the great Powers of Europe, yet there had been earlier gatherings of diplomatic representatives of several states, as, for instance,

<sup>48</sup> Meiern, I, 201, 211, 215-218, 256-257, 266; Gärtner, II, 338, 347, 361, 363, 371, 449, 483, 681; III, 18.

<sup>49</sup> Meiern, I, 218-219, 266, 309-311; Gärtner, III, 316, 456, 501; Le Clerc, I, 150, 290; Wiequefort, II, 172, 206.

<sup>50</sup> A. F. Berner, *Kongresse und Friedensschlüsse der neueren Zeit* in J. C. Bluntschli—K. Brater, *Deutsches Staats-Wörterbuch* (1857), V, 666; H. Bonfils, *Manuel de Droit International Public* (1912), 504; C. Calvo, *Droit International* (1887), III, 409; F. de Cyssy, *Dictionnaire du Diplomate et du Consul* (1846), 169; Fabrizi, *I Congressi Diplomatici dal 1648 al 1878*; G. de Garden, *Traité Complet de Diplomatie* (1833), III, 424; A. W. Heffter, *Europäische Völkerrecht* (1888), 471; F. von Holtzendorff, *Handbuch des Völkerrechts* (1885), III, 679; C. de Martens—F. H. Geffcken, *Guide Diplomatique* (1866), I, 179; E. Nys, *Droit International*, II, 486; P. Pradier—Fodéré, *Cours de Droit Diplomatique* (1881), II, 305; and his *Traité de Droit International Public* (1885), VI, 229; E. Satow, *Guide to Diplomatic Practice* (1917), I, 3; W. Zaleski, *Völkerrechtliche Bedeutung der Congresse* (1874).

the negotiations at Cateau-Cambrésis in 1559 between the plenipotentiaries of Spain, France and England. Moreover, the term *congress* was employed in diplomatic speech long before the assemblage of negotiators at Münster and Osnabrück, and it did not have its origin, as a late writer has implied, in the Latin phraseology of the peace treaty of 1648.

The Latin word which the diplomats of the sixteenth and early seventeenth centuries used for designating an assembly of monarchs or plenipotentiaries, was *conventus*. Grotius employed it in his *De jure belli ac pacis* and in his letters as Swedish ambassador at Paris to the Chancellor of Sweden, where he repeatedly used the term in referring to the Congress of Cologne in 1636 and the following years.<sup>51</sup> Richelieu and the French diplomats spoke of these conferences as *assemblées*.<sup>52</sup> But the Italians called them *congressos*—a term by no means of recent invention, for Guicciardini in his *Storia d'Italia*, written about the year 1540, referred to the celebrated conference between Louis XII and Ferdinand of Aragon at Savona in 1507 as a *congresso*.<sup>53</sup> In the seventeenth century we find that Mazarin, the papal nuncios, and the Venetian ambassadors at the European capitals, employed the term in their diplomatic correspondence.<sup>54</sup> The Spaniards also used it.<sup>55</sup> In the meantime, the Latin expression *ad congressum* became a stock phrase in the Imperial German correspondence upon the subject of the proposed assemblage of negotiators for peace; frequently the phrase was changed to the hybrid form *zum congressum*; and, before the plenipotentiaries exchanged their credentials at Münster and Osnabrück, the Imperialists had abandoned this round-about method of referring to the assembly, and had adopted

<sup>51</sup> *De jure belli ac pacis*, lib. II, cap. xxiii, 8; *Grotii epistolæ ad Oxenstierna*, II, ii, 217, 276, 289, etc.

<sup>52</sup> Avenel, V, 705, 974; VI, 37, 275, 1024, 1030; VIII, 139, 300, 311, 324, 337, 373.

<sup>53</sup> Edition of G. Rosini (Pisa: 1822), III, 192. Guicciardini called the negotiations at Mantua in 1512, a *congregazione*.—*Ibid.*, V, 19.

<sup>54</sup> Compare Chéruef, *op. cit.*, I, 218; Barozzi and Berchet, *op. cit.*, II, ii, 306, 355; Gärtner, I, 17, 28, 30, 594.

<sup>55</sup> *Colección de Documentos inéditos para la Historia de España*, LXXII, 4, 7, 8; A. Cánovas del Castillo, *op. cit.*, I, 392, 396, 397.

the abbreviation of the Italian word, which has ever since been retained in the vocabulary of diplomacy.<sup>56</sup>

## VI. THE SEAT OF THE CONGRESS

The Treaty of Hamburg provided that the plenipotentiaries for negotiating the general peace were to meet at two towns in Westphalia,—Münster and Osnabrück,—although these two conferences were to be regarded as constituting one and the same congress, and presumably the results of the negotiations were to be amalgamated into one and the same treaty. This division of the congress into two separate groups was due partly to the Papal policy of unfriendliness toward the Protestant Powers, and partly to the fear of the Swedes that their prestige and interests would be injured by treating in the same conference with their ally, France. Early in the year 1636, Oxenstierna had given a qualified assent to the proposal for sending plenipotentiaries to Cologne; but the Papacy failed to give the Swedish Government a formal invitation to accept its mediation at Cologne, and by the time that the Venetian offer of mediation reached Stockholm, the Swedes had begun to fear the pre-eminence of France in any general peace congress.<sup>57</sup>

Yet France and Sweden were bound by solemn agreement to negotiate only concurrently with the Empire. Such had been the stipulation of the Treaty of Wismar (March 20, 1636).<sup>58</sup> Neither ally was to receive proposals from the enemy for peace or for suspension of hostilities without the knowledge of the other, and there was to be no negotiation except conjointly and with common consent. Thus it was clear that if France used the mediation of the Papacy in treating with the Empire and Spain, and if the Swedes refused to undergo the humiliation of coming to Cologne without an invitation from the

<sup>56</sup> Meier, I, 25, 27, 31, 65; Gärtner, I, 55, 63-65, 74, 76, 109, 127, 176, 181, 183, 199, 201, 204, 605. The French appear to have been somewhat reluctant to adopt the term *congrès*. Compare Furetière, *Dictionnaire Universel* (1690), I; Richelet, *Nouveau Dictionnaire François* (1719), I, 322; *Dictionnaire Universel François et Latin* (1732), II, 121; Richelet, *Dictionnaire de la Langue Française* (1759), I, 559.

<sup>57</sup> Hallendorff, V, ii, 371; Avenel, V, 463.

<sup>58</sup> Hallendorff, V, ii, 370.

principal mediating Power, then the negotiations must needs be conducted simultaneously in two different places. Accordingly, when d'Avaux and Salvius concluded the new Franco-Swedish alliance at Hamburg, it was agreed that in the peace negotiations France should treat at Cologne, and Sweden at Hamburg or Lübeck, while at either place the German adherents of France and Sweden might attend and participate in the negotiations. The two conferences were to be in close communication. The treaty also provided:

An agent of Sweden shall be present at Cologne and an agent of France at Hamburg, both without power for treating with the common enemy and without votes in the proceedings, but with the understanding that they shall attend the sessions and report upon the negotiations to their plenipotentiaries, and also give their advice if necessary. But nothing shall be concluded in either conference without the knowledge and consent of both allies.<sup>59</sup>

Of course, the cities of Cologne and Hamburg were too far apart—to say nothing of the distance between Cologne and Lübeck—for the successful conduct of such negotiations as were contemplated in the treaties of 1636 and 1638. And it was a happy decision on the part of the French to propose a pair of towns in closer proximity.<sup>60</sup> Richelieu disliked the plan of holding separate conferences: it would excite jealousy, he said, between the two sets of negotiators, and still more between the mediators, who would dispute the glory of being the first to achieve the drafting of a treaty and thus too hastily conclude a peace! Acting upon instructions from Paris, d'Avaux proposed to Salvius that the Swedes should treat with the Emperor at Osnabrück, Frankfurt-am-Main, or else Cologne, while the French should treat with the Emperor at Münster, Mayence or Wesel. Later in the negotiations d'Avaux himself limited the proposal to Münster and Osnabrück. Both of these towns were in Westphalia; the former was within the jurisdiction of the Elector of Cologne and was a place

<sup>59</sup> "Intersit tamen tractatui Coloniensi Agens Suecicus, Hamburgensi Gallicus, uterque tam sine potestate agendi cum hoste communi quam sine voto, sed honesta cum sessione, ut audiant, referant ad Plenipotentiarios quisque suos, et sicubi opus, præstentes moneant: Nihil autem illis insciis aut inconsultis utrobique tractetur."—Hallendorff, V, ii, 427.

<sup>60</sup> Avenel, VIII, 371; Bougeant, I, 392-393.

altogether fitting and proper for a legate of the Pope to appear. On the other hand, Osnabrück was a Protestant town, or at least the greater number of the burghers had inclined toward the Lutheran faith in the Reformation, and at the present moment it was occupied by the military forces of the Swedes. The distance between the two towns was but thirty miles, so that the couriers of the plenipotentiaries could easily pass from one to the other in less than a day's ride. And all in all, the selection of these two places seemed the most practical solution for complying with the unusual requirements as to unanimity of negotiation in two separate conferences demanded by the Franco-Swedish treaty of 1638, as well as for meeting the scruples and prejudices of the Papacy and of all other Powers concerned.

Salvius at first objected to the French proposal to change the stipulations of the treaty of 1638 in regard to the place of the peace conferences. No diplomat ever knew better than he how to play the game of *quid pro quo* and how to take exceptions to propositions, if for no other reason than for the purpose of gaining concessions elsewhere. The German Diet also raised objections to Münster and Osnabrück, proposing instead the towns of Speier and Worms, or Frankfurt and Mainz. In the end, however, the French proposal prevailed. The new alliance between France and Sweden, signed on June 30, 1641, stipulated that the future peace congress should be held in two towns near together, like Münster and Osnabrück;<sup>61</sup> while the preliminary treaty of peace signed on December 25, 1641, by the plenipotentiaries of the Empire, France and Sweden, contained the following provision:

The places for conducting the general negotiations shall be Osnabrück and Münster in Westphalia. . . . The two congresses shall be regarded as one. And not only the roads between Osnabrück and Münster shall be secure for the parties concerned to go and come with complete freedom and safety, but also a station between the two cities as shall be convenient for the intercommunication of the particular negotiators shall enjoy the same security as the aforesaid cities.<sup>62</sup>

<sup>61</sup> Hallendorff, V, ii, 473. The Latin text is also in Bougeant, I, 425. A summary in French is in Léonard, V; and Bernard, III, 414.

<sup>62</sup> "Loca universalis tractatus sint Osnabruga, et Monasterium in Westphalia . . . Uterque congressus pro uno habeatur; atque ideo non solum itinera inter utramque urbem omnibus, quorum interest, ultro citroque libere, secureque com-

## VII. IS A TRUCE NECESSARY BEFORE A PEACE CONGRESS?

Alberico Gentili in 1588 defined a truce as an agreement which suspends hostile acts without interrupting the state of war; and a century later Textor gave the vivid German definition: *ein Stillstand der Waffen*.<sup>63</sup> Nearly all of the early writers referred to a truce as a preliminary step to negotiations for peace. But it was not claimed that a suspension of hostilities was a prerequisite for such negotiations. However, among the papers of the French plenipotentiaries at the Congress of Westphalia is to be found a memoir which attempts to answer among other questions: "Is it necessary to make a truce or suspension of arms before treating of peace?" The memoir declares that it was the general practice among nations that negotiations for peace should be preceded by a suspension of hostilities.<sup>64</sup> Such procedure assured the belligerents of some degree of security and tranquillity for the deliberations on peace, and constituted a logical and easy transition from a state of war to a state of peace. Thereupon the writer laid down the conditions,—mostly to the advantage of France,—upon which his country would be willing to sign a truce. What these conditions were, or how much truth there was in the Spanish accusations in 1643 that Mazarin desired not a peace but only a long truce, is a matter for difference of opinion. The significant thing for the student of the development of international law is the attempt here made to lay down a rule that a peace congress should begin with a suspension of hostilities.

The rule formulated by the French Government in 1643 could be supported by numerous precedents. The conferences at Cambrai in 1528 and at Cateau-Cambrésis in 1559 were preceded by signed truces.<sup>65</sup> But, on the other hand, many a peace has been negotiated without a formal suspension of hostilities, as in 1598, when Henri

meari posse, tuta sunt: Sed et quicunque locus interjectus particulari tractantium conventui pro mutua communicatione videbitur commodus, eadem, quae dictae urbes, securitate fruatur."—Hallendorff, V, ii, 502.

<sup>63</sup> *De jure belli*, lib. II, cap. xii. Compare Textor, *Synopsis juris gentium*, cap. xix, 1.

<sup>64</sup> Le Clerc, I, 158.

<sup>65</sup> Dumont, IV, 515; V, 27.

IV of France shamefully abandoned his solemn oaths to the English and Dutch and accepted the mediation of the Papacy in the negotiation of the Treaty of Vervins with Spain. Although it may appear inconsistent for a state to negotiate and fight at the same time, yet it is not reasonable to set up a rule that will tend to hamper or limit the beginning of any negotiations which may in the end lead to peace. At any rate, the French view did not carry the day in the Thirty Years' War against the opinion of the Imperialists and Spaniards, who believed that they had much to gain and little to lose by keeping their armies actively employed.

The agitation for a general truce had begun with the proposal of the Papacy for a suspension of arms during the Congress of Cologne. Richelieu agreed to this policy on condition that the truce should be made on a basis of *uti possidetis*, but the sanguine hopes of Olivarez to gain territory from France had defeated the proposal in 1637.<sup>66</sup> Negotiations for a general armistice continued in the following years, but without a successful outcome. No agreement was reached, even after the assembling of the diplomats at Münster and Osnabrück. Throughout the duration of the Congress of Westphalia (1644-1648) the armies of the belligerent states continued the struggle with varying fortune on either side.

#### VIII. NEUTRALIZATION OF THE SEATS OF THE CONGRESS

The two towns chosen for the Congress of Westphalia were within the area of hostilities. Münster had suffered from the ravages of the Protestant armies and Osnabrück was still occupied by a Swedish garrison. In view of the fact that no truce had been concluded, the negotiators of the Treaty of Hamburg agreed that it was not sufficient to rely upon the safe-conducts mutually exchanged among the bel-

<sup>66</sup> Concerning the negotiations upon a general truce, see: *Mémoires de Richelieu*, IX, 403-418; X, 85-156, 521-539; Avenel, VI, 21, 241; VII, 771, 778, 1026; VIII, 314, 316, 319, 322, 329; Chéruel, I, xciii, 653, 890; Le Clerc, II, 7-11; Gärtner, II, 598, 649; *Grotii epistolæ ad Oxenstiernam*, II, ii, 202, 329, 469, 490; Pufendorf, *De rebus Suecicis*, lib. ix, 87; xi, 76-79; xii, 55-61; xiv, 86; Bougeant, I, 279-280, 358-364; II, 36-37, 82-84; Adam Adami, cap. ii, 14; A. Cánovas del Castillo, I, 186-191, 310-316; G. Fagniez, *op. cit.*, II, 392-399; A. Waddington, *op. cit.*, I, chap. iii.

ligerents nor upon the diplomatic immunities of the plenipotentiaries. In order to protect the congress from all direct inconveniences attending the conduct of hostile operations, it was proposed at Hamburg to neutralize the two Westphalian towns as well as the roads between them.

The neutralization of local territory was by no means an unprecedented step. Among a large number of earlier cases may be cited the neutralization of the town of Vervins in 1598, when Henri IV of France negotiated peace with Spain under the mediation of the Papacy.<sup>67</sup> The Thirty Years' War, from beginning to end, was replete with cases of neutrality and neutralization.<sup>68</sup> Indeed, neutrality in a great variety of forms played such an important rôle in the diplomacy of this period and in its political literature, that some modern authorities on international law reproach Grotius for not having used the material so close at his hand and for not having devoted more space to the subject of neutrality and neutralization in his *De jure belli ac pacis*. These authors overlook the all-important fact that the men of the seventeenth century were by no means emancipated from the slavish preference for classical learning and scholastic methods. No doubt Grotius made a more effective contribution to the science of international law in 1625 by not breaking abruptly with the past, even if it had been possible for him to do so. However this may be, the Thirty Years' War soon proved to be a rich laboratory for those jurists, like Zouche and Textor, who were beginning to develop the science of international law along its empirical as well as its philosophical side, and who were undertaking to build up a body of rules drawn from actual experience in the realm of international intercourse. In 1680, Johann Textor included a long chapter on neutrality and neutralization in his text-book on the Law of Nations (cap. xxvi), citing and commenting upon cases drawn from the history of the Thirty Years' War and the age of Louis XIV, and pub-

<sup>67</sup> Dumont, V, 541.

<sup>68</sup> For accounts of neutrality and neutralization in the Thirty Years' War, see P. Schweizer, *Geschichte der Schweizerischen Neutralität*, I, 27-36, 213-280; S. Schopfer, *Principe Juridique de la Neutralité*, 103-28; R. Dollot, *Origines de la Neutralité de la Belgique et la Système de la Barrière*, 30-99; E. Nys, *Études de Droit International et de Droit Politique*, II, 72-77.



lishing extracts *verbatim* taken from the public records for the purpose of illustrating and fortifying his propositions,—a remarkable step in the development of international law!

In the Treaty of Hamburg of December 25, 1641, the signatory Powers provided for the neutralization of the seats of the Congress as follows:

The peace negotiations shall be at Osnabrück and Münster in Westphalia, from which towns all garrisons and troops must depart as soon as the exchange of the safe-conducts of the plenipotentiaries shall be effected. During the Congress the said cities are to be absolved of their oaths of allegiance to one and the other party, and shall be in a state of neutralization. In the meanwhile the custody of the two cities shall be in the hands of the Magistrates and Burghesses of the said cities and their proper soldiers. On their side, the Magistrates shall give a Reversal or solemn assurance that they will faithfully and securely safeguard the congress and religiously preserve and protect the persons, suite and equipment of the plenipotentiaries; and if anything is required of the Magistrates for the common good of the negotiators, they shall perform it accordingly, executing nothing in favor of one party or the other, but only on the request of both corps of plenipotentiaries.<sup>69</sup>

In a subsequent article it was provided that the roads between the two towns were to be neutralized and made secure and free for the use of the plenipotentiaries and their suites. A place was to be selected midway between the two towns as a junction for the communication of the plenipotentiaries, which also was to be neutralized. Finally, if the congress should break up without concluding a treaty of peace, the neutrality of Münster and Osnabrück was to continue for six weeks following upon the rupture of negotiations; after which time the towns were to receive back the troops formerly garrisoned there.

<sup>69</sup> "Loca universalis tractatus sint Osnabruga et Monasterium in Westphalia, ex quorum utroque statim post commutatos, ut infra dicetur, salvos conductus, educantur militaria partium præsidia, et durantibus congressibus dictæ civitates sacramento erga utriusque partis solutæ ad neutralitatem obligentur. Magistratui interim proprio cum milite et civibus sua cujusque urbis custodia relinquatur. Ipse vicissim dato reversali obstringatur ad fidelitatem et securitatem toti conventui præstandam, et tractantium res ac personas, comitatumque sancte habendum et custodiendum. Et si quid ab eo pro communi tractatus bono requisitum fuerit, præstet se quidem obsequentem; neutrius tamen partis jussa exequatur, nisi ab utroque Legatorum corpore collegiatim insinuata."—Hallendorff, V, ii, 501.

The form of the Reversal, or solemn assurance to be given by the Magistrates of the two towns, was adopted at Hamburg at the time of signing the treaty. It pledged the Bürgermeisters and the Rathes to perform the obligations imposed upon them by the Treaty of Hamburg, and it absolved both towns from their oaths of allegiance—on the part of Münster to the Emperor and the Elector of Cologne, and on the part of Osnabrück to the Emperor and the Bishop of Osnabrück.<sup>70</sup> Accordingly, after the ratification of the Treaty of Hamburg (May 23, 1643) and the exchange of safe-conducts, the Imperial agent, Johann Cranen, and the Elector of Cologne at Münster, on May 27, 1643, in the presence of a French representative, notaries and other dignitaries, absolved the Bürgermeister and Rath of their allegiance and received their Reversal as provided in the Treaty of Hamburg. At the same time the neutrality of the town was proclaimed.<sup>71</sup>

The next step was for one of the Imperial plenipotentiaries to proceed to Osnabrück and repeat the ceremony of neutralization at that place. But the Swedish garrison still occupied the Petersberg, and Graf von Auersberg complained to the Danish King as mediator that the Swedes were not carrying out their obligations. After waiting several weeks for the Swedish troops to withdraw, the *actum relaxationis juramenti et institutæ neutralitatis* in the name of the Emperor was eventually celebrated at Osnabrück. On July 8, Salvius, one of the Swedish plenipotentiaries, executed a similar document on the part of Queen Christina, while shortly afterwards the commandant at Osnabrück received his orders to march.<sup>72</sup>

#### IX. SAFE-CONDUCTS, THE EQUALITY OF STATES AND OTHER PROBLEMS

In his *De jure belli*, published in the year 1588, Gentili devoted a chapter to the question of safe-conducts, and Zouche included commentaries upon this subject in his *Juris et judicii fecialis sive juris inter gentes*, published in 1650. During the Thirty Years' War the subject was one of considerable importance. At several times in the preliminary negotiations for peace, it engaged the paramount atten-

<sup>70</sup> Gärtner, I, 5-14.

<sup>71</sup> *Ibid.*, I, 269-327; Meiern, I, 14-22.

<sup>72</sup> *Ibid.*, I, 10, 328, 343, 346, 365, 370-401; Meiern, I, 22.

tion of the diplomats. The delay of Spain and the Emperor to grant safe-conducts to the Swedes, the Dutch and the Protestant princes of Germany was one of the causes for the failure of the Congress of Cologne; while the preliminary peace negotiations at Hamburg were obstructed for two years and more by the insistence of the French upon the insertion of phrases in the safe-conducts to be given by the Emperor which would constitute a recognition by the Emperor of the sovereignty and independence of the Protestant German princes.<sup>73</sup> Finally, the treaty of December 25, 1641, provided that within the space of two months the belligerents should deposit in the hands of the ambassadors of the King of Denmark at Hamburg the requisite number of safe-conducts properly executed according to a form prescribed by the mediator.

Instead of two months, however, two years and a half passed away before the exchange of safe-conducts took place. Immediately following the signing of the Treaty of Hamburg, the Imperial plenipotentiary, Graf von Lützow, was recalled for having been, as d'Avaux bitterly complained, so simple as to believe that the House of Austria sincerely wished peace.<sup>74</sup> But the Emperor might well regret a treaty which permitted his rebellious vassals to treat with him as independent Powers, and which gave full latitude to French intervention in German affairs. Among the numerous reasons assigned for the refusal at Vienna to ratify the treaty, the new Imperial plenipotentiary mentioned the neutralization of Münster and Osnabrück as derogatory to the dignity of the Emperor, whose safe-conducts should be deemed sufficient protection to the negotiators.<sup>75</sup> This position the Germans were unable to maintain in the subsequent negotiations; and like several other provisions which were unfavorable to the Emperor, the stipulation for the neutralization of Münster and Osnabrück remained in the treaty as ratified on July 22, 1642.<sup>76</sup> The end of the

<sup>73</sup> Avenel, VII, 1034; VIII, 323, 337; *Mémoires de Richelieu*, X, 500-512; Bougeant, I, 347-358, 452-469; Pufendorf, *De rebus Suecicis*, lib. x, 72-87; xi, 62-66; xiii, 88-90; Adam Adami, cap. ii, 10-12; iii, 2-3.

<sup>74</sup> Bougeant, I, 481.

<sup>75</sup> Pufendorf, *De rebus Suecicis*, lib. xiv, 51-52; Lünig, *Literæ procerum Europæ*, I, 337-357; Londorp, V, 775-782; Le Clerc, I, 113-134.

<sup>76</sup> Hallendorff, V, ii, 501.

diplomatic tangles, however, had not yet been reached. More delays ensued over the question of the Spanish ratification and exchange of safe-conducts; and the plenipotentiaries might have continued their wranglings for another year had not the King of Denmark brusquely fixed upon April 18, 1643, as the day for the delivery of the proper documents preliminary to the Congress of Westphalia.<sup>77</sup>

Another diplomatic problem, the ever-recurring quarrel over the pre-eminence of the crowns, also appeared in the negotiations at Hamburg, and was further complicated by the persistent refusal of the French to recognize Ferdinand III as Emperor of the Holy Roman Empire. When the final draft of the Treaty of Hamburg began to take form, d'Avaux attempted to persuade Salvius that the King of France should be named before the Queen of Sweden.<sup>78</sup> Salvius objected; and it was ultimately agreed that Lützow should give to d'Avaux a copy of the treaty signed by himself in which the name of the French King and the town of Münster appeared before the name of the Swedish Queen and the town of Osnabrück, while the order of these names should be reversed in the copy handed to Salvius. After the recall of Lützow, his successor, Graf von Auersberg, declared that the former ambassador had exceeded his powers and had treated with the crowns of France and Sweden as if they were the equals of the Emperor.<sup>79</sup> But this contention did not appear to be well founded. Withal, while the legal pre-eminence of the Emperor was not injured in the preliminary negotiations, the Swedes won a victory over the claims of the French. By refusing to come to Cologne, and by insisting upon two sets of treaties from the Imperial seal, they did more than merely avoid a contest of their claim for equality in the family of nations. They gained recognition from the Hapsburgs that in the world of diplomacy Sweden had equal status with France.

<sup>77</sup> Gärtner, I, 77.

<sup>78</sup> Pufendorf, *De rebus Succicis*, lib. xiii, 90; Chemnitz (Stockholm: 1856), IV, i, 76.

<sup>79</sup> Pufendorf, *De rebus Succicis*, lib. xiv, 52.

## X. CONCLUSION

In conclusion, we should observe that the period of the Thirty Years' War served as a laboratory for the jurists of the latter half of the seventeenth century, who began to develop the science of international law along empirical lines. Particularly, the period of eight or nine years of negotiations for peace which preceded the Congress of Westphalia afforded a large number of precedents and cases in diplomacy and law similar to those which Zouche, Textor and Wicquefort employed to illustrate their texts, and which in time crowded out the classical and biblical allusions of Victoria, Suarez, Gentili and Hugo Grotius. In the matter of diplomatic procedure, the various problems connected with mediation occupied a large part of the attention of the diplomats. Numerous offers of good offices and mediation were made by the neutral Powers,—Denmark, Venice, England, the Papacy, and many lesser states. The ensuing struggle on the part of Richelieu to prevent these offers of good offices and mediation from wrecking the Franco-Swedish alliance, the difficulties arising out of the Papal refusal to mediate between the Catholic and Protestant Powers, the delicate task of ousting the King of Denmark as a mediator at Osnabrück after he had become a belligerent, and the quarrel over the personnel of the mediators and the peace delegations, gave rise to a considerable number of diplomatic precedents. Throughout these negotiations the policy of Richelieu moved steadily toward the goal of a universal peace congress, and in the end his great purpose was achieved. The Congress of Westphalia was thus the first of the general conferences in which the majority of European Powers were represented. The practice of negotiating in diplomatic assemblies was not, however, a new procedure, as witness, for instance, the Congress of Cateau-Cambrésis in 1559. Even the term *congress* was already found in the diplomatic vocabulary; and the custom of neutralizing the seat of a congress had previously been established. The holding of the Congress of Westphalia simultaneously in two towns thirty miles apart was the result of the Papal policy of intolerance toward the Protestant Powers and of the well-founded fear of the Swedes regarding the overbearance of France in the peace negotia-

tions. No general truce preceded the congress. The proposal of the Pope for a truce and the contention of the French that a suspension of arms must necessarily precede a peace congress, did not carry the day. Throughout the sitting of the Congress of Westphalia, the armies of the belligerent states actively continued their hostile operations. Numerous other details of diplomatic procedure, such as the form of the safe-conducts, and the question of the equality of states in the assembly, hindered the making of peace.

The eight or nine years of negotiations preliminary to the Congress of Westphalia cannot properly be separated from the four years of negotiations at the congress itself, although it is convenient to consider them apart in a study of diplomatic procedure, for the purpose of inquiring into the problems involved in the calling together of the first great congress of the European Powers. Of course, throughout this period, the chief obstacles to peace were the eagerness of the belligerents to support their claims by force of arms and the demand of Richelieu for a universal congress. For nearly a decade the Imperialists desperately fought this demand. If they could have broken the Franco-Swedish alliance, or if they could have driven the French and Swedish armies out of Germany, the Thirty Years' War would have had a different ending. The final adoption of the French program for a general peace congress was a brilliant triumph of French diplomacy over the Hapsburg policy of *Divide et impera*. Although the various belligerents took advantage of every question of procedure with the intention of retarding such peace negotiations as did not appear to be for their own interest, yet, on the other hand, these problems constituted in themselves a very real hindrance in the way of the pacification of Europe.

KENNETH COLEGROVE.

# THE RELATIONS BETWEEN THE UNITED STATES AND PORTO RICO.\*

PAST, PRESENT AND FUTURE.

## PART II (CONTINUED).

### 3. THE INSULAR CASES AND THE STATUS OF PORTO RICO.

*Downes v. Bidwell*.<sup>80</sup> This is really the most important judgment in all the Insular Cases so far as a determination of the present status of Porto Rico is concerned. It is interesting because in it the now famous doctrine of non-incorporation is developed. It will be well, however, to state at the outset that in this case there was no majority opinion of the court and that the decision was reached merely by the concurrence of a majority of the judges in what is styled in the syllabus of the case as the conclusion and judgment of the court.

In view of the great diversity of opinion evinced by the judges in this case, as will later appear, it was regarded at the time by very able lawyers and commentators of note as a very doubtful precedent which the court might not feel in the future bound to accept as the settled law of the land. So far, however, it has stood the test of time, and although the recent passage of the so-called Jones-Shafroth Act, extending to Porto Ricans a large measure of self-government and the privilege of American citizenship,<sup>81</sup> seemed to reopen the question of the juridical status of Porto Rico and require the rejection or modification of the doctrines laid down or relied upon in this important decision, its conclusions have been affirmed and ratified and are largely

\* Continued from previous numbers of this JOURNAL, Vol. IX, pp. 883 et seq.; Vol. X, pp. 65, 312.

<sup>80</sup> 182 U. S. 244.

<sup>81</sup> Public No. 368, 64th Cong. The text of this law will also be found in the Supplement to this JOURNAL. Vol. XI, pp. 66-93; see "Some Historical and Political Aspects of the Government of Porto Rico," in *The Hispanic-American Historical Review*, Vol. II, No. 4.

accepted at the present time as a correct expression of the national sense. It is at any rate the only authoritative declaration of the present status of Porto Rico so far made by any competent branch of the government.<sup>82</sup> It is therefore important to examine this decision somewhat at length in order to ascertain and determine the present status of the Island and the particular doctrines upon which that status is supposed to be founded.

The ostensible purpose of the case under consideration was to test the constitutionality of the Foraker Act,<sup>83</sup> and to recover back certain duties exacted and paid under protest upon merchandise brought into the port of New York from Porto Rico after the passage of that Act. The duties in question were exacted under Section 3 of the Act, which provided, "that on and after the passage of this Act all merchandise coming into the United States from Porto Rico and coming into Porto Rico from the United States shall be entered at the several ports of entry upon payment of fifteen per centum of the duties which are required to be levied, collected and paid upon like articles of merchandise imported from foreign countries,"<sup>84</sup> and the question briefly stated, was whether Article I, Section 8, of the Constitution of the United States, providing that "all duties, imposts and excises shall be uniform throughout the United States" was applicable to this case; that is to say, whether this particular provision of the Constitution must be considered as controlling the action of Congress when legislating on the subject for a territory situated as Porto Rico was.

This case differs from the other two already considered<sup>85</sup> in that here the test is not, as there, whether Porto Rico was or was not a foreign country, either in the international or in the constitutional sense, but rather whether the Island had become an integral part of the United States, so as to be included within the purview of the con-

<sup>82</sup> The latest confirmation of this status is to be found in the People of Porto Rico *et al. v. José Muratti*, and the People of Porto Rico *v. Tapia*, recently decided *per curiam* by the Supreme Court on the authority of the case under consideration and other cases mentioned in the docket. (245 U. S. 639.)

<sup>83</sup> U. S. Stat. at Large, Vol. 31, p. 77.

<sup>84</sup> See "Some Historical and Political Aspects of the Government of Porto Rico," *supra*, note 81.

<sup>85</sup> This JOURNAL, Vol. X, p. 317 et seq.



stitutional provision aforementioned, and the question therefore involved, in substance, a determination of the juridical status of the Island from the point of view of constitutional law.

Internationally, there could hardly be any question that Porto Rico was, and is, by virtue of the treaty of cession, an integral part of the United States. Upon the formal exchange of the ratifications of that treaty Porto Rico ceased to be a Spanish province; it ceased to be Spanish territory subject to the Crown of Spain. In contemplation of law, the treaty of cession operated to sever all political connections between Porto Rico and the mother country; so that, in respect to Spain, Porto Rico became a foreign country, its Spanish nationality being entirely destroyed by the transfer. It is clear that the same act which divested the Island of its Spanish nationality gave to it, as a sort of international compensation, the nationality of the United States. That such result was equally contemplated by the high contracting parties is apparent in the treaty itself, where they repeatedly speak of the future "nationality of the territory" over which Spain relinquished or ceded her sovereignty.<sup>86</sup> If this was not the result contemplated by them, what then was the nationality referred to in this expression? In the case of Cuba it might be assumed that the contracting parties contemplated Cuban nationality, because as to that island Spain was only *relinquishing* her claim of sovereignty over and title to the island.<sup>87</sup> But as to Porto Rico, could it be said that the contracting parties had in mind a Porto Rican nationality? Evidently not, because the words of the treaty in respect to this Island leave no room for doubt as to the fact that an *absolute transfer* of sovereignty was intended. The words of the treaty are: "Spain cedes to the United States the Island of Porto Rico."<sup>88</sup> This provision, accord-

<sup>86</sup> See specially Article IX.

<sup>87</sup> Article I of the Treaty of Paris contains the following provisions: "Spain relinquishes all claim of sovereignty over and title to Cuba. And as the Island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property."

<sup>88</sup> Article II of the Treaty of Paris is in full as follows: "Spain cedes to the United States the Island of Porto Rico and other Islands now under Spanish

ing to well established principles of international law, necessarily implies an absolute transfer of sovereignty over the ceded territory and a complete change in the nationality thereof in favor of the acquiring state. Thus in respect to Porto Rico, the nationality mentioned in the treaty can be no other than the nationality of the United States. The Supreme Court itself, in spite of the great division of opinion among its learned members upon other aspects of the whole question, has expressly and unanimously declared in *Gonzales v. Williams*,<sup>89</sup> which is another of the Insular Cases, that by the act of cession the nationality of Porto Rico became American instead of Spanish. It follows therefore that Porto Rico must be internationally considered as incorporated into and forming an integral part of the United States.

But while there cannot be much doubt upon these simple propositions affecting the status of Porto Rico in an international way, it is a matter of much perplexity, in view of the great diversity of opinion expressed in the case under consideration, to determine the more complicated question of the present status of Porto Rico in the constitutional sense. It may be observed that in determining, as in this case, whether a specific provision of the Constitution is applicable to a given territory, it may not be absolutely necessary to fix the status of such territory in an affirmative manner; it may be enough, perhaps, to negative the existence of the particular status required by the provision in question.

Thus, the views of Mr. Justice Brown and Mr. Justice White, while conflicting as to the reasons upon which they base their conclusions, reach the same decision as to the inapplicability of the clause. Mr. Justice Brown makes his decision depend on the proposition that the clause in question is only applicable to the States as such; that Porto Rico is not a State, and that, in consequence, the said clause is not applicable to that Island. Mr. Justice White, and with him Mr. Justice Shiras and Mr. Justice McKenna, on the other hand, declares, that the said clause is applicable not only to the States, but also to a terri-

sovereignty in the West Indies, and the Island of Guam in the Marianas of Ladrones." See in this connection this JOURNAL, Vol. IX, pp. 896-897; Vol. X, pp. 67-69, 72-74.

<sup>89</sup> 192 U. S. 1.

tory which has been incorporated into and forms a part of the United States; but they hold that Porto Rico has not been incorporated and therefore the clause in question has no application to it. Mr. Justice Gray, by a somewhat different line of reasoning, follows the conclusion of Mr. Justice White and his associates, while Mr. Chief Justice Fuller, Mr. Justice Harlan, Mr. Justice Brewer and Mr. Justice Peckham dissent upon the ground that the revenue clause in question was applicable throughout the United States, that Porto Rico was a part of the United States, and therefore, that the said clause was applicable to Porto Rico, at any rate after the passage of the Foraker Act. Mr. Justice Harlan expressly declared in a separate opinion that Porto Rico became, after the ratification of the treaty with Spain, a part of the United States in respect to all its territory and people, and that Congress could not thereafter impose any duty, impost or excise with respect to that Island or its inhabitants which departed from the rule of uniformity established by the Constitution.

It is important to notice that in these Insular Cases, the Supreme Court was divided into two equal groups of judges, with Mr. Justice Brown holding the balance of power between them.<sup>90</sup> In the case under consideration the court divided in opinion generally upon the status of Porto Rico and specially upon the applicability of the revenue clauses of the Constitution. In the first instance, Mr. Justice Brown reasserts his former position as to the status of the Island, in accord with the opinion of the group made up by his former assenting colleagues [Chief Justice Fuller and Justices Harlan, Brewer and Peckham]; seeking, however, to find a plausible and rational solution of the problem which is uppermost in his mind, he ventures to set up a new doctrine which finds no support among his brethren, but compels him to join in the conclusion of the other group, composed of Justices White, Shiras, McKenna and Gray.

The results sought to be avoided by Mr. Justice Brown and Mr. Justice White and his followers in this case were difficulties inherent in the problem connected with a legitimate application of the provisions of the Constitution in the management of the Philippine Islands. Mr. Chief Justice Fuller, Mr. Justice Harlan, Mr. Justice

<sup>90</sup> See this JOURNAL, Vol. X, pp. 318, 321.

Brewer and Mr. Justice Peckham were not so much concerned with these difficulties as they were with the application of what they believed to be the clear and indisputable law of the case, according to the whole constitutional history and precedents laid down by the Supreme Court in the past.

This gave rise for a time to the question whether the case under consideration settled at all the status of Porto Rico under the Foraker Act, and whether the doctrine of non-incorporation developed by Mr. Justice White was in reality a doctrine sustained by a majority of the court. In our estimation the majority only sustains the judgment and decision of the court in so far as it holds that the revenue clause in question does not apply to the Island. Beyond this conclusion there is no majority at all. As to the status of the Island, it seems evident that if there is a majority, it is the other way. The doctrine in question is sustained only by Mr. Justice White and two of the other three justices who concurred in his views; Mr. Justice Brown nowhere in this case signifies his assent to the doctrine, but still seems to agree, as in the *De Lima* case, with his now dissenting brethren, that Porto Rico is a part of the United States, although not in the sense of being included within the custom union of the States. His doctrine that the clauses of the Constitution like the one in question which are operative only "throughout the United States," extend to the territories only when and in so far as Congress shall direct, does not seem, on the other hand, to find any support among his brethren, who quite unanimously reject the idea that the Constitution does not extend of its own force to the territories. Mr. Justice White, in stating his eight propositions on the force and applicability of the Constitution in the territories, expressly declared that it is not to be supposed that "the Constitution may or may not be applicable at the election of any agency of the government," and that "Congress in governing the territories is subject to the provisions" thereof.

Examining the opinions of the judges somewhat more in detail, we find that had Mr. Justice Brown agreed to the proposition that the uniformity clause in question was equally applicable to the territories as to the States, which is practically admitted by all the judges, and specially and more frankly by the dissenting members of the court,

the decision would have been just the reverse of what it was, for in that case he would have joined with the dissenting group of justices headed by the Chief Justice and changed their opinion into the actual judgment of the court, with the result that the novel doctrine of non-incorporation would have been converted merely into a doctrine of the dissenting opinion, as in the *De Lima* and *Dooley* cases decided the same day, and might never have acquired any importance in the judicial history of this country. But Mr. Justice Brown could not see his way clear to do so. Influenced by the magnitude of the immense problems then confronting the American people, he concluded his opinion by saying:

Patriotic and intelligent men may differ widely as to the desirableness of this or that acquisition, but this is solely a political question. We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demands it. A false step at this time might be fatal to the development of what Chief Justice Marshall called the American Empire. Choice in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.

We are therefore of opinion that the Island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker Act is constitutional, so far as it imposes duties upon imports from such Island, and that this plaintiff cannot recover back the duties exacted in this case.

Writers and commentators have seen in these conclusions of Mr. Justice Brown an unavoidable inconsistency with, if not an open contradiction of, his previous opinion in the *De Lima* case, in which he expressly declared, that "by the ratification of the Treaty of Paris

the Island became territory of the United States." Does not, however, the expression territory appurtenant and belonging to the United States mean and imply in his line of reasoning exactly the same thing as territory of the United States? Much of this charge of inconsistency and contradiction brought against Mr. Justice Brown in the consideration of the Insular Cases is probably due to the fact that his opinion in the case under consideration has been largely misunderstood. His opinion merely holds that Porto Rico was not a part of the United States within the meaning of the revenue clauses of the Constitution. These clauses, in his estimation, had application only among the several States, and his definition of the status of Porto Rico as a territory appurtenant and belonging to the United States is clearly aimed to negative the idea that the Island was a part of the United States in the peculiar sense that he gave to those words. When viewed in this light, it becomes quite apparent that there is no such inconsistency or contradiction in his conception of the real status of the Island. As defined by him in the case under consideration, such status is logically and juridically the same thing as he defines it in the *De Lima* case, namely, that of a territory of the United States, because in his opinion the United States was a union of States, the territories being merely property of the United States.

Turning now to Mr. Justice White's opinion, we see, as we have already noticed, that he joins also in the conclusion and judgment of the court to the extent that the Foraker Act was constitutional in so far as it imposed duties upon imports from Porto Rico and that the plaintiff could not recover back the duties exacted in the case. This conclusion, of course, is predicated primarily upon the general proposition that the revenue clauses of the Constitution have no application to the Island. As to the proposition whether Porto Rico was or not a part of the United States, he evidently concurred in the conclusion of Mr. Justice Brown that the Island "is a territory appurtenant and belonging to the United States, *but not a part of the United States* within the meaning of the revenue clauses of the Constitution," but a careful study of the two opinions will disclose the fact that there is no harmony between them in respect to the sense in which these important declarations are to be interpreted. While Mr. Justice Brown,

on the one hand, is properly to be taken as meaning purely and simply that Porto Rico was not a part of the United States because the Island was not a State of the Union but only a territory—like any other territory of the United States, so far as the status of the territories in general is concerned—Mr. Justice White, upon the other hand, evidently holds that Porto Rico is not a part of the United States in a different and more complicated sense. The distinction involves the famous “doctrine of non-incorporation,” which has been so much attacked and criticized by eminent lawyers and writers as inconsistent with general principles, the Constitution of the United States and former precedents laid down by the Supreme Court. This doctrine is indeed the keynote in Mr. Justice White’s opinion, not only in the case now under consideration, but also in all the other Insular Cases, in which he has always taken such an important part.

The grounds upon which the said doctrine is founded have been frequently attacked as rather obscure and conflicting with certain recognized principles of international and constitutional law, and former precedents of the Supreme Court. Its soundness, however, is not to be found so much in acknowledged principles of law and precedents of the court as in the fact that it is a new constitutional theory perfectly warranted by the Constitution itself and international law, and which is, moreover, quite necessary for the successful administration of newly acquired territories by the United States.

To begin with, Mr. Justice White states eight propositions of law relating to the applicability and force of the Constitution in the territories. From these propositions, which are amply sustained by the whole constitutional history of the country and corroborated by numerous precedents laid down by the Supreme Court, he concludes that in legislating for Porto Rico, Congress was only empowered to act within the Constitution and subject to its applicable limitations, and that every provision of the Constitution which applies to a country situated as was that Island, was potential in Porto Rico. He then says that the “determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States.”

The learned Justice then referred to some previous decisions of the court as illustrating the principles by him enunciated and said that although, as a general rule, the status of a particular territory has to be taken into consideration when the applicability of any provision of the Constitution is questioned, it does not follow when the Constitution has absolutely withheld from the government all power on a given subject, that such an inquiry is necessary. He then establishes a distinction between the restrictions which regulate a granted power and those which withhold all authority on a particular subject. The former would seem to depend for their applicability upon the status of the particular territory in question, while the others would in the nature of things apply in such territories irrespective of their particular status. As the constitutional restrictions involved in the case under consideration evidently belonged to the first category of this division, it must follow, according to his views, that the question relative to the constitutionality of the provision of the Foraker Act in controversy was to be answered by determining the status of Porto Rico at the time of the passage of the Act in question.

According to the general reasoning in Mr. Justice White's opinion, the question before the court was not merely whether, as in the cases of discovery, military conquest or the like, Porto Rico had been constitutionally placed under the authority, jurisdiction, or control of the United States, nor even whether by virtue of the cession from Spain and the acceptance and occupation by the United States, it had absolutely become the subject of territorial proprietorship by the United States; but whether at the time of the passage of the Act in question it had been *incorporated*, that is to say, whether it had been allowed to form an integral part of the United States, as composed of States and Territories, so that it might be considered as invested with all the constitutional attributes attending such a state of incorporation.

Entering upon an extended discussion of the conflicting claims of counsel in respect to the effects of the acquisition upon the status of the Island, he cites many instances and examples of both a mere *occupation* and a complete acquisition of foreign or vacant territory effected through any of the well known methods sanctioned by the law of nations, whether by virtue of specific direction of Congress or as



the result of a successful war or even on account of a treaty stipulating for a temporary or permanent occupation or the absolute cession of the territory in question, in order to show that while in all such cases the said territory may be, internationally, under the authority, jurisdiction, control, and even the complete sovereignty of the United States, it can nevertheless not be considered as forming an integral part of the United States, but must remain, until Congress shall manifest its determination in the matter, in a middle ground of disincorporation between an internationally American and a constitutionally foreign condition.

Referring to the ability of the treaty-making power to provide for or against an immediate incorporation of the acquired territory into the United States, Mr. Justice White said:

There has not been a single cession made from the time of the Confederation up to the present day, excluding the recent treaty with Spain, which has not contained stipulations to the effect that the United States through Congress would either not disincorporate or would incorporate the ceded territory into the United States. . . .

When the various treaties by which foreign territory has been acquired are considered in the light of the circumstances which surrounded them, it becomes to my mind clearly established that the treaty-making power was always deemed to be devoid of authority to incorporate territory into the United States without the assent, express or implied, of Congress; and that no question to the contrary has ever been even mooted.

Then he went on to declare that in order to appreciate this it is essential to bear in mind what the words "United States" signified at the time of the adoption of the Constitution. Stating that when by the treaty of peace with Great Britain the independence of the United States was acknowledged, it is unquestioned that all the territory within the boundaries defined in that treaty, whatever may have been the disputes as to title, substantially belonged to particular States, he said that the entire territory was part of the United States, and that all the native white inhabitants were citizens of the United States and endowed with the rights and privileges arising from that relation. Then he said:

When the Northwest Territory was ceded by Virginia, it was expressly stipulated that the rights of the inhabitants in this regard

should be respected. The ordinance of 1787, providing for the government of the Northwest Territory, fulfilled this promise in behalf of the Confederation. Without undertaking to reproduce the text of the ordinance, it suffices to say that it contained a bill of rights, a promise of ultimate statehood, and it provided (italics mine) that "The said territory and the States which may be formed therein *shall ever remain a part of this Confederacy of the United States of America*, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made, and to all the acts and ordinances of the United States in Congress assembled, conformably thereto" . . . Thus it was that, at the adoption of the Constitution, the United States, as a geographical unit and as a governmental conception both in the international and domestic sense, consisted not only of States, but also of territories, all the native white inhabitants being endowed with citizenship, protected by pledges of a common union, and, except as to political advantages, all enjoying equal rights and freedom, and safeguarded by substantially similar guaranties, all being under the obligation to contribute their proportionate share for the liquidation of the debt and future expenses of the general government. . . .

It will be readily observed that these declarations of Mr. Justice White as to the import of the words United States are quite different from the conclusions of Mr. Justice Brown in respect to the same subject.

Following his own line of reasoning, Mr. Justice White proceeds to show how the provisions of the famous Northwest Territory Ordinance were successively extended by Congressional action to such other territories as were ceded by individual States to the United States, in order to effect their incorporation into the United States, and reviews the history of the acquisitions by treaty from France, Spain, Mexico and Russia, which are the acquisitions more closely resembling that of Porto Rico by the United States.

As to Louisiana, which was acquired from France by the treaty of 1803, he reached the conclusion that, in accordance with the prevailing view to the effect that "although the treaty of cession might stipulate for incorporation and citizenship under the Constitution, such agreements by the treaty-making power were but promises depending for their fulfillment on the future action of Congress," the newly acquired territory "was governed as a mere dependency, until . . . it was by the action of Congress incorporated as a Territory of

the United States, and the same rights were conferred in the same mode by which other Territories had previously been incorporated, that is, by bestowing the privileges of citizenship and the rights and immunities which pertained to the Northwest Territory."

As to Florida, which was acquired from Spain by the treaty of 1819, drafted, although with slight modification, in accordance with the precedent afforded by the treaty ceding Louisiana, he concludes that Congress, acting under the precedent afforded by the Louisiana case, adopted a plan of government which was wholly inconsistent with the theory that the territory had been incorporated, and that finally "an act was passed . . . which, while not referring to the Northwest Territory ordinance, *in effect endowed the inhabitants of that territory with the rights granted by such ordinance.*"

Respecting California, which was acquired from Mexico by the treaty of 1848 through a readjustment of boundaries between the two countries instead of by an outright cession as in the previous treaties, Mr. Justice White said that "the controversy which was then flagrant on the subject of slavery prevented the passage of a bill giving California a territorial form of government, and California after considerable delay was therefore directly admitted into the Union as a State." He further said that, after the ratification of the treaty, various laws were enacted by Congress, which in effect treated the territory as acquired by the United States, and that the executive officers of the government, conceiving that these Acts were an implied or express ratification of the provisions of the treaty by Congress, acted upon the assumption that the provisions of the treaty were operative, and hence incorporation had thus become effective. As to this case, he said:

Ascertaining the general rule from the provision of this latter treaty and the practical execution which it received, it will be seen that the precedents established in the cases of Louisiana and Florida were departed from to a certain extent; that is, the rule was considered to be that where the treaty, in express terms, brought the territory within the boundaries of the United States and provided for incorporation, and the treaty was expressly or impliedly recognized by Congress, the provisions of the treaty ought to be given immediate effect. But this did not conflict with the general principles of the law of nations which I have at the outset stated, but enforced it, since the

action taken assumed, not that incorporation was brought about by the treaty-making power wholly without the consent of Congress, but only that as the treaty provided for incorporation in express terms, and Congress had acted without repudiating it, its provisions should be at once enforced.

In respect to Alaska, which was acquired from Russia by the treaty of 1867, Mr. Justice White stated that it was sufficient to say that that treaty also contained provisions for incorporation and was acted upon exactly in accord with the practical construction applied in the case of the acquisition from Mexico. "However," he said, "the treaty ceding Alaska contained an express provision excluding from citizenship the uncivilized native tribes, and it has been nowhere contended that this condition of exclusion was inoperative because of the want of power under the Constitution in the treaty-making authority to so provide. . . . The treaty concerning Alaska, therefore, adds cogency to the conception established by every act of the government from the foundation—that the condition of a treaty, when expressly or impliedly ratified by Congress, becomes the measure by which the rights arising from the treaty are to be adjusted." Then follows a consideration of various other acts of the government which to him are wholly inexplicable except upon the theory that it was admitted that the Government of the United States had the power to acquire and hold territory without immediately incorporating it. He cites, for instance, the simultaneous acquisition and admission of Texas, which was admitted into the Union as a State by joint resolution of Congress of March 1, 1845, instead of by treaty. He could not understand to what grant of power under the Constitution this action could be referred unless it was admitted that Congress is vested with the right to determine when incorporation arises.

Summing up his conclusions as to the ability of the treaty-making power to provide for or against an immediate or prospective incorporation of the acquired territory, he said:

It is, then, as I think, indubitably settled by the principles of the law of nations, by the nature of the government created under the Constitution, by the express and implied powers conferred upon that government by the Constitution, by the mode in which those powers have been executed, from the beginning, and by an unbroken line of

decisions of this court, first announced by Marshall and followed and lucidly expounded by Taney, that the treaty-making power cannot incorporate territory into the United States without the express or implied assent of Congress, that it may insert in a treaty conditions against immediate incorporation, and that on the other hand when it has expressed in the treaty the conditions favorable to incorporation they will, if the treaty be not repudiated by Congress, have the force of law of the land, and therefore by the fulfillment of such conditions cause incorporation to result. It must follow, therefore, that where a treaty contains no conditions for incorporation, and, above all, where it not only has no such conditions, but expressly provides to the contrary, incorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family.

Coming right down to the application of his doctrine to the case under consideration, Mr. Justice White said:

Does, then, the treaty in question contain a provision for incorporation, or does it, on the contrary, stipulate that incorporation shall not take place from the mere effect of the treaty and until Congress has so determined?

Here Mr. Justice White quotes Articles II, IX and X of the Treaty of Paris, and says:

It is to me obvious that the above quoted provisions of the treaty do not stipulate for incorporation, but on the contrary, expressly provide that the "civil rights and political *status* of the native inhabitants of the territories hereby ceded," shall be determined by Congress.

When the rights to which this careful provision refers are put in juxtaposition with those which have been deemed essential from the foundation of the government to bring about incorporation, all of which have been previously referred to, I cannot doubt that the express purpose of the treaty was not only to leave the *status* of the territory to be determined by Congress but to prevent the treaty from operating to the contrary.

Referring to the contention that the Foraker Act was to be taken as a ratification of the treaty and that incorporation had therefore taken place, he said:

Of course, it is evident that the express or implied acquiescence by Congress in a treaty so framed cannot import that a result was

brought about which the treaty itself—giving effect to its provisions—could not produce. And, in addition, the provisions of the act by which the duty here in question was imposed, taken as a whole, seem to me plainly to manifest the intention of Congress that for the present at least Porto Rico is not to be incorporated into the United States.

In conclusion, Mr. Justice White arrives at an unequivocal statement of his conception of the status of Porto Rico, and reached a final disposition of the case, by saying:

The result of what has been said is that whilst in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the Island had not been incorporated into the United States, but was merely appurtenant thereto as a possession. As a necessary consequence, the impost in question assessed on merchandise coming from Porto Rico into the United States after the cession was within the power of Congress, and that body was not, moreover, as to such imposts, controlled by the clause requiring that imposts should be uniform throughout the United States; in other words, the provision of the Constitution just referred to was not applicable to Congress in legislating for Porto Rico.

As will be readily seen, these declarations of Mr. Justice White clearly establish the fact that, while he reached the same conclusion as to a decision in the case, his conception of the status of Porto Rico was clearly different from that entertained by Mr. Justice Brown. It would seem, therefore, that, as already suggested, the case under consideration is no authority for a determination of the status of Porto Rico, because as to this particular point there is no majority of the court. Taking into consideration, however, subsequent decisions of the Supreme Court<sup>91</sup> clearly approving the doctrine of non-incorporation sustained by him, it must be admitted that the opinion of Mr. Justice White in this case contains the prevailing doctrine and must be considered as the main authority for the status of Porto Rico as it is

<sup>91</sup> *Hawaii v. Mankichi*, 190 U. S. 197; *Dorr v. U. S.*, 195 U. S. 138; *Rasmussen v. U. S.*, 197 U. S. 516; *Kopel v. Bingham*, 211 U. S., 468; *Dowdell v. U. S.*, 221 U. S. 91; *The People of Porto Rico v. Rosaly*, 227 U. S. 270; *Ocampo v. U. S.*, 234 U. S. 91; and the recent cases decided per curiam: *The People of Porto Rico et al. v. Carlos Tapia*, 245 U. S. 639, and *The People of Porto Rico et al. v. José Muratti*, 245 U. S. 639.

understood to be at the present time, namely, a mere dependency, a possession, or, technically, an unincorporated territory of the United States.

Examining the other opinions in the case under consideration, we find that Mr. Justice Gray's concurring opinion, while rather difficult to analyze, does not follow the same lines of reasoning of Mr. Justice White's opinion.

As to the dissenting opinions, it may be sufficient to say that they, in the main, sustain the position of the court in the cases of *Dooley v. United States*<sup>92</sup> and *De Lima v. Bidwell*,<sup>93</sup> already considered,<sup>94</sup> rejecting both Mr. Justice White's doctrine of non-incorporation and that of Mr. Justice Brown relative to the application of the Constitution to the territories. They also maintain the proposition that Porto Rico was a territory of the United States and that the revenue clauses in question were in force in the Island as being applicable *throughout* the United States. Mr. Justice Harlan's opinion is particularly worthy of notice for the vigor of his contentions and his clarity in the enunciation of doctrines which, but for the Philippine adventure, might have been applied by a unanimous court in the consideration of the Insular Cases.

### PART III.

#### 1. THE DOCTRINE OF NON-INCORPORATION : ITS APPLICATION ; ITS EFFECTS ; ITS VALUE AS A CONSTITUTIONAL ASSET.

From a careful consideration and study of Mr. Justice White's opinions in the so-called Insular Cases, and especially of his extended opinion in the case of *Downes v. Bidwell*,<sup>95</sup> and subsequent opinions by him and other members of the Supreme Court,<sup>96</sup> the following propositions may be collected.

The doctrine of non-incorporation is grounded in the first place upon the undoubted principle that every nation has the right of determining for itself the status of such territories as it may acquire. This

<sup>92</sup> 182 U. S. 222.

<sup>93</sup> 182 U. S. 1.

<sup>94</sup> This JOURNAL, Vol. X, pp. 318 and 321.

<sup>95</sup> *Supra*, p. 490.

<sup>96</sup> *Supra*, note 90.

right legally inheres in the general principle of sovereignty, and is just as perfect in the United States as in any other so-called sovereign nation of the world. It is obvious that in this country, where the sovereignty of the nation resides in the people, the determination of the status of newly acquired territory belongs, in the first instance, to the people of the United States. But these people, as at present constituted and organized as a nation, do not act directly in the matter of exercising their sovereignty in any particular case, but have, in a general way, expressed their will in a written Constitution, the provisions of which, in each particular case, constitute a guiding light for those entrusted with the powers and duties of government. The Constitution does not contain any express provisions in this respect, but taking into consideration the nature of the government created under that instrument it is a fundamental part of the doctrine of non-incorporation that the power to fix the status of newly acquired territories in all cases clearly devolves *eo instanti* upon the Congress composed of the Senate and the House of Representatives. It is also a part of this doctrine that in cases where there is a treaty providing for incorporation, this will take effect only if the treaty is not repudiated, but accepted and acted upon by Congress. And it is also held that when the treaty contains no conditions for incorporation and, *a fortiori*, when the treaty not only has no such conditions but expressly provides to the contrary, incorporation does not arise until Congress shall determine that the acquired territory should be taken into and made a part of the United States.

It may be added that in the discharge of its responsibilities, Congress may defer the incorporation of newly acquired territory as long as it shall see fit; or it may, in the pursuance of a different policy, embracing considerations of both national and international nature, resolve to abandon or reject altogether the purpose to incorporate, as in the case of the Philippine Islands, and establish the territory as an independent government, bound to the United States by indissoluble ties of mutual protection and friendship. It may further constitute the said territory and people into an autonomous commonwealth, bound to the United States by such outward evidences of sovereignty or by such ties of dependency as may be deemed essential



and indispensable for the protection and security of the United States or for the advancement of its commercial and financial interests or its political or military prestige.<sup>97</sup> There is no doubt that in the determination of each particular case, Congress will feel bound to discharge the great duties imposed upon it not only with that sense of responsibility which it owes to the people of the United States, but also with a due regard for the interests and wishes of the peoples concerned in such determination.

In the meantime, and until public opinion has crystallized into some form of solution, the territory in question is held to be, according to this doctrine of non-incorporation, in the condition of a colonial possession, waiting, so to speak, upon the decision of Congress.

In contrast with the status of such territories as have been already incorporated into the United States, the condition of the newly acquired territory is generally described as denoting a status of non-incorporation preceding that of incorporation. For this reason, the efforts of a good many able minds have been directed for the last twenty years to determine in some practical manner the precise conditions which may be required to bring about the change from the state of non-incorporation into that of incorporation. These efforts, however, have in most every case resulted in failure. The reason lies in the fact that, as a rule, the attempt has been made to define the status of incorporation as comprising such and such characteristic features relating to the organization of the local government and to such and such others which pertain to the political status and civil rights of the native inhabitants of the territory in question, without a proper regard to the all-important consideration that incorporation is merely a question of intention, the intention of Congress to incorporate. Thus when the fact of incorporation comes up as depending on the interpretation of an Act of Congress relating to newly acquired territory, the question is not what are the particular features of this Act in respect to the organization of local government or to the civil rights and political status of its inhabitants, but rather,

<sup>97</sup> See a very illuminating article relating to this question, although upon a different subject, by George A. Malcolm in *Am. Law. Rev.*, Vol. LI, No. 4, p. 543.

does such an Act clearly manifest the intention of Congress to incorporate? Or does it, on the contrary, show a deliberate purpose on the part of Congress not to incorporate? In all cases, Congress does manifest a purpose either to incorporate or not to incorporate; and when, from the provisions of the Act, it clearly appears that the intention of Congress has been not to incorporate, but to leave the territory in question in its condition of non-incorporation, it would be idle to contend that the effect of the Act was to bring about incorporation just because there are in the act such and such provisions which affect its organization<sup>98</sup> or the civil rights or political status of the inhabitants.

This was peculiarly shown in two recent Porto Rican cases, where it was contended that the granting of American citizenship to the inhabitants of Porto Rico had the effect of incorporating the Island into the United States. The Supreme Court, however, reached a unanimous decision against any such contention upon the authority of *Downes v. Bidwell* and other subsequent cases cited by the Court.<sup>99</sup>

From what has been said above it may be inferred that the true rule in respect to incorporation is to ascertain from the general provisions of the Act the real determination of Congress in the matter, without giving particular importance to specific terms, and so long as Congress does not clearly manifest its purpose to incorporate, but,

<sup>98</sup> Organization refers to the government; incorporation to the status of the territory in question. A territory is said to be organized when Congress has legislated for it, establishing a formal civil government therein. See *Re Lane*, 135 U. S. 443. It is said to be incorporated when it has been allowed to become an integral part of the United States. See Mr. Justice White's opinion, *supra*, p. 490. Thus a territory may be organized and yet not incorporated, or, conversely, it may be incorporated and yet not organized. That Porto Rico is a completely organized territory was justly asserted in *Kopel v. Bingham*, 211 U. S. 469; but see opinion of Mr. Justice Brown in *Rasmussen v. U. S.*, 197 U. S. 531. See also *The People of Porto Rico v. Manuel Rosaly y Castillo*, 227 U. S. 270, where it was decided that the government created by the Organic Act has all the attributes of sovereignty as understood under the American system of government.

<sup>99</sup> *The People of Porto Rico et al. v. Carlos Tapia*, 245 U. S. 639, which was an appeal from the District Court of the United States for the District of Porto Rico; and *The People of Porto Rico et al. v. José Muratti*, 245 U. S. 639, which came up in error to and on a writ of *certiorari* to the Supreme Court of Porto Rico.

on the contrary, shows a decided inclination not to do so, incorporation does not take place. Obviously, the intention of Congress may be manifested either expressly or impliedly, in one way or in another, but in all cases the purpose may be ascertained without any great difficulty by examining carefully all the provisions of the Act, and then the question of incorporation is readily answered.

The doctrine of non-incorporation is calculated, as has been seen, to exclude the newly acquired territory from the United States and make it a foreign territory in the constitutional sense, for the purpose of administration, according to the necessities of the case. So far as the application of the provisions of the Constitution is concerned, the principal effect of the doctrine is to withhold from the territory in question the application of all such provisions as might be applied to it, because of their being clearly applicable everywhere *throughout* the United States. This doctrine, however, the same as that of Mr. Justice Brown, does not affect the application of the restrictions of the Constitution which withdraw from the Central Government all authority to act on a particular subject. Thus, for instance, the prohibition of the enactment of *ex post facto* laws and bills of attainder and of conferring titles of nobility, are generally controlling in respect to the newly acquired territory. This is not so, because they are in any way operative in the territory in question, but merely because they deprive Congress of all power to legislate upon such matters. In this sense the condition of Porto Rico differs diametrically from that of the Territories, technically so called, for these are considered and held to be incorporated into and constituting an integral of the United States, with the result that no provision of the Constitution is withheld from them, except only such as specifically refer to the States or which from their very nature can have no application to the Territories as such.

As to the native inhabitants, it is quite apparent that the effect of this doctrine of constitutional exclusion is to withhold from them American citizenship, and place them in a class by themselves, which gives them a condition of peculiar interest and importance, affecting their political status and civil rights. This deserves a separate study, which we shall attempt to make in the succeeding section.

In conclusion it may be said that, although the doctrine of non-incorporation may be, as is claimed by very able and practical lawyers, a pronounced departure from general principles, and precedents of the Supreme Court and constitutional theories scarcely denied by Chief Justice White, it must be admitted that the doctrine is one of the most farsighted pieces of judicial interpretation of the Constitution handed down by the court since the time when Chief Justice Marshall maintained the jurisdiction of the Supreme Court to declare unconstitutional and invalid a solemn Act of Congress, which was in conflict with the provisions of the Constitution of the United States—a jurisdiction, which, however much disputed, criticized or abused either as a political or as a judicial proposition, has always deserved, does deserve and will probably continue for a long time to deserve, the admiration and gratitude of learned, conservative and patriotic Americans. And, so far as the practical results of this doctrine evolved by the present Chief Justice of the Supreme Court are concerned, there can be no controversy as to the fact that it did accomplish a necessary thing, namely, the exclusion of alien territories and peoples acquired by treaty or by conquest—an exclusion which, although particularly intended at the time in respect to the Philippines, is extended as the *suma providentia* of this doctrine to all. It has been said that in this it realized the most cherished hopes of the policy of imperialism, and that, to say the least, it was a doctrine without which that policy could not indeed have been carried very far. But that is no argument against the immense value of the doctrine as a great constitutional asset.

## 2. THE POLITICAL STATUS OF PORTO RICANS: AMERICAN AND PORTO RICAN CITIZENSHIP

The general question relating to the political status and civil rights of the native inhabitants of newly acquired territory has been the subject of extended discussions and no little diversity of opinion among those qualified to speak authoritatively. This question, however, has never been before the Supreme Court, at least after the decisions in the so-called Insular Cases, and the only case in which it seems to have been presented at all was that of *Gonzalez v. Will-*

*iams*<sup>100</sup> which is another of them; but this case had reference only to the aspect of alienage and was considered from a purely statutory point of view. From the point of view of international law, the question would not seem to present any great difficulty or embarrassment, and, when properly construed, the case of *Gonzalez v. Williams* is undoubtedly an authority for the proposition that the inhabitants of newly acquired territories are not aliens in an international sense. It was indeed held in that case that a native inhabitant of Porto Rico, Isabella Gonzalez, was not an alien within the intent and meaning of the immigration laws; but it must be remembered that these laws particularly refer to foreigners in the *strict international sense*. The court specifically refers to this condition by declaring that "we cannot concede that the word alien, as used in the Act of 1891,<sup>101</sup> embraces the citizens of Porto Rico."

We think it clear that the Act relates to foreigners as respects this country, to persons owing allegiance to a foreign government, and citizens or subjects thereof; and that citizens of Porto Rico, whose permanent allegiance is due to the United States; who live in the peace of the dominion of the United States; the organic law of whose domicile was enacted by the United States, and is enforced through officials sworn to support the Constitution of the United States, are not "aliens" and upon their arrival by water at the ports of our mainland are not "alien immigrants", within the intent and meaning of the Act of 1891.

It would seem, on the other hand, that if they are not aliens, they must be Americans, that is to say, nationals, for national is the antithesis of alien, in the international sense.<sup>102</sup> This proposition also

<sup>100</sup> 192 U. S. 1.

<sup>101</sup> 26 Stat. 1084, c. 551.

<sup>102</sup> "Manifestly the nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal or otherwise as may be provided." *Boyd v. Thayer*, 143 U. S. 162. By Article IX of the Treaty of Paris, the right to retain Spanish nationality was specifically reserved to the natives of Spain residing in the Island, when complying with certain conditions stipulated therein. As to the Porto Ricans, no such right was reserved to them, but their civil rights and political status was to be determined by Congress. See also, in this connection, Coudert, *Certainty and Justice*, pp. 136 et seq., and Dudley P. McGovney in *Columbia Law Rev.*, Vol. XI, p. 231.

finds support in the language employed by the court in the same case of *Gonzalez v. Williams*, which was, by the way, decided by a unanimous opinion of the court. In this case, Mr. Chief Justice Fuller, speaking for the court, quoted, evidently with approval, from an opinion of the Attorney General in respect to a provision of the Tariff Act of 1897<sup>103</sup> exempting "works of art, the production of American artists residing temporarily abroad", in which he said that a native inhabitant of Porto Rico temporarily residing in Paris was entitled to the benefit of that provision simply because he had become an American upon the acquisition and by virtue of the passage of the Foraker Act, which evidently was considered as an acceptance by Congress of the cession.

How far, however, will these considerations affect the political status and civil rights of the native inhabitants of newly acquired territories under the Constitution and laws of the United States is a question which has not received much attention from writers and commentators upon the subject. Judging, however, from the course adopted by the Executive Department of the Government in several cases presented, in which either the political status or the civil rights of these persons were involved under different laws of Congress, it is quite safe to infer that they are not considered as entirely devoid of rights which usually do not appertain to foreigners, but to Americans, not as citizens, but as nationals of this great Republic.

Considering the doctrine of non-incorporation and its scope with respect to the status of newly acquired territories and peoples, it would clearly seem that while these people may not be considered as aliens in an international sense, yet from a constitutional point of view, they are not citizens. In the case of Porto Rico it must be admitted that, as said by a distinguished lawyer and careful writer, the treaty of Paris did "whatever it could by its language to prevent the inference that there was any collective naturalization of the people" of the Island. "While a treaty may indeed collectively naturalize a whole people, nevertheless it is fair to assume that the treaty must intend such naturalization to take place. In this case,

<sup>103</sup> 30 Stat. 151, 203, c. 11.

the political status and civil rights having been reserved for the future action of Congress, it is fair to argue that no naturalization" took place.<sup>104</sup>

There is no question, however, that as the inhabitants of newly acquired territory are not aliens in the technical sense of that word, the legal disabilities of alienage and the laws which apply to aliens do not affect them. It is apparent, nevertheless, that nationality would not of itself alone confer upon them the rights which appertain to citizenship. It has been contended with quite a profusion of data and arguments, that nationality and citizenship are convertible terms under the Constitution of the United States.<sup>105</sup> But, in view of the decisions in the Insular Cases and subsequent decisions of the Supreme Court, it would seem that, if this question should ever be presented to the consideration of this high tribunal in a proper case, the decision would not favor any such contentions, or even the further one of the same writer that the "citizenship" of these truly alien peoples would be a "qualified" American citizenship. To be consistent with the doctrine of non-incorporation, the Supreme Court could not, in our estimation, do otherwise than declare that these people are "foreign" to the United States in a domestic sense, in the sense that they have not been incorporated into the body of American citizenry.<sup>106</sup> And this probably would be so also both in the case of such inhabitants as were born at the time of the acquisition and such as are born afterwards, for the doctrine of non-incorporation leaves no room for the distinction of *ante nati* and *post nati* as an element in the construction of the opening clause of the Fourteenth Amendment to the Constitution. Thus, besides consistency, there would be clarity, uniformity and certainty.

As to their civil rights, it may be easily inferred that on account of the double aspect of their status, they would depend in each case upon the particular aspect involved; that is to say, whether the right

<sup>104</sup> Frederic R. Coudert, *op. cit.*, p. 148-149.

<sup>105</sup> "American Citizenship," by Dudley O. McGovney, of Tulane University, in *Columbia Law Rev.*, Vol. XI, p. 231.

<sup>106</sup> See dissenting opinion of Mr. Justice White in *Dooley v. United States*, 182 U. S. 222.

involved their status as nationals in the international sense, or whether it involved, on the contrary, their status as "outsiders, foreigners, or aliens," in the constitutional sense.

Taking into consideration this double aspect of the status of the native inhabitants of newly acquired territories, and referring to the difficulty of finding a proper designation of this status under existing vocabularies, another writer of note has felt justified in saying that "perhaps it would be both appropriate and timely to derive the term 'appurtezens' from the word *appurtenant* used by the court in defining the position of the Insular territory, just as the term citizen has been derived from the word *city*."<sup>107</sup>

While this question concerning the status of the native inhabitants of newly acquired territories may seem always interesting and involving a good deal of national importance in the United States, with respect to the native inhabitants of Porto Rico it is merely an academic question having only a historical value, on account of the recent passage by Congress of the so-called Jones-Shafroth Act by which the privilege of American citizenship is extended to them.<sup>108</sup> It should be said, however, that the practical result of the extraordinary status of the native inhabitants of Porto Rico previous to the passage of that law worked in a good many instances very grievous injustice. For instance, a Porto Rican who had graduated from an American University, say of New York or Vermont, could not practice before the courts of those States, merely because he was not a citizen of the United States.<sup>109</sup> And where the right to vote was made to depend directly on the status of citizenship, he could not exercise the franchise even though he was burdened with practically all the duties of a citizen. Porto Ricans could not then enter the Diplomatic or Consular service of the United States, nor could they sue in a Federal Court, nor claim any immunity or privilege under the Constitution, except those which are insured to every person by that instrument. If residing abroad, he was, however, entitled to the protection of the

<sup>107</sup> A. J. Lien, *Privileges and Immunities of Citizens of the United States*, pp. 26-27.

<sup>108</sup> *Supra*, note 81.

<sup>109</sup> The same could be said as to the practice of other professions, such as that of medicine, pharmacy, etc.



United States.<sup>110</sup> It may be well to remember that under the American system of government the idea of citizenship involves the concept of a double citizenship: citizenship of the United States and citizenship of the individual State. Carrying this concept one step further, the inhabitants of the territories are in the same way deemed to be citizens thereof, whether the said territory is incorporated or not. Thus, the people of Porto Rico may be properly deemed to be citizens of Porto Rico. However, the Foraker Act provided that all inhabitants continuing to reside therein who were Spanish subjects on April 11, 1899, and then resided in the Island, and their children born subsequent thereto, were to be deemed and held to be citizens of Porto Rico, except such as had elected to preserve their Spanish allegiance on that date, in accordance with the provisions of the said treaty.

A distinguished Porto Rican lawyer and writer, the late José de Diego, who was, until his recent demise, the undisputed leader of the independentist movement in Porto Rico, seriously contended<sup>111</sup> that this particular provision of the old Organic Act of Porto Rico expressly recognized a Porto Rican citizenship, wholly incompatible with American citizenship and clearly declaratory of a Porto Rican sovereignty which it was, inferentially, the intention of Congress to recognize, in thus fixing the political status of that part of the inhabitants of the Island. However noble, patriotic and commendable, from a Porto Rican point of view, this contention may be, it could not indeed stand the test of even a casual examination from a purely American point of view. That such a contention is wrong was amply shown by the passage of the Jones-Shafroth Act, by which, while expressly preserving to the Islanders who should so prefer the self-same Porto Rican citizenship which had been deemed to exist under the Foraker Act, Congress extended to Porto Ricans the privilege of American citizenship, which is incompatible with citizenship under a different sovereignty than that of the United States, unless it is State citizenship. Territorial citizenship implies indeed a sovereignty of the territory; but this sovereignty could not be in conflict with the

<sup>110</sup> Section 7 of the so-called Foraker Act, *supra*, specifically provided that Porto Ricans were entitled to the protection of the United States.

<sup>111</sup> *Nuevas Campañas*, 207-213.

sovereignty of the United States and must be limited to the powers granted to it by the Organic Act which brings it into existence. Porto Rican citizenship then, let it be said clearly, is here meant in an especial, purely statutory sense, in the sense of the Act, the evident purpose of which was merely to designate that part of the people of Porto Rico who could not properly be designated as American citizens within the body politic created by the said Act, and nothing more.<sup>112</sup> As to an alleged Porto Rican sovereignty recognized, as Mr. de Diego said, by the Treaty of Paris, we have already seen that the treaty does not do any such thing.<sup>113</sup> As to the policy of a recognition by Congress of the sovereignty of the people of Porto Rico as an independent government and, therefore, of a Porto Rican citizenship in an international sense, it may be observed that this is a question which involves a good many considerations of a national and international character, the study of which should be undertaken as soon as possible by those whose duty it is to do so. The same may be said as to the advisability of finally incorporating the Island as a full-fledged State of the Union, or establishing it as a fully self-governing people under the continued sovereignty of the United States.

Respecting the present status of Porto Ricans, there can be no doubt that they are both citizens of Porto Rico and citizens of the United States. It must be observed, however, that Porto Rican citizenship is a purely local status depending, as all local citizenship in the United States, upon residence in the place. Thus when a Porto Rican acquires a residence in another place<sup>113a</sup> he ceases for all legal

<sup>112</sup> See, however, *The People of Porto Rico v. Rosaly*, *supra*.

<sup>113</sup> *Supra*, p. 485-486.

<sup>113a</sup> *Reily v. Lamar*, 2 Cranch 357; *The Dos Hermanos*, 2 Wheat. 98.

There must be an actual, not pretended, change of domicile; in other words, the removal must be "a real one, *animo manendi*, and not merely ostensible." *Case v. Clarke*, 5 Mason, 70. The intention and the act must concur in order to effect such a change of domicile as constitutes a change of citizenship. In *Ennis v. Smith*, 14 How. 400, 423, it was said, that "a removal which does not contemplate an absence from the former domicile for an indefinite and uncertain time is not a change of it," and that while it was difficult to lay down any rule under which every instance of residence could be brought which may make a domicile of choice, "there must be, to constitute it, actual residence in the place, with the intention that it is to be a principal and permanent residence." *Morris v. Gilner*, 129 U. S. 328.

purposes to be a citizen of Porto Rico. In the same way, when he returns to reside in the Island he becomes again a citizen of Porto Rico. The same may be said of any American citizen who chooses to reside in or to depart from the Island. He will be a citizen of Porto Rico as long as he continues to reside in the Island. If he leaves with an intention to reside somewhere else, he ceases automatically to be a citizen of Porto Rico. It must be also observed, on the other hand, that American citizenship is of a universal character and accompanies the person wherever he goes. Thus a Porto Rican is just as much an American citizen while residing in Porto Rico as when he resides in any of the States or abroad. And his status in this respect is the same as that of any native-born citizen of the United States.

### 3. THE CIVIL AND POLITICAL RIGHTS OF PORTO RICANS UNDER THE AMERICAN SYSTEM OF GOVERNMENT

Considering, for our present purpose, the concept of citizenship as generally understood under American institutions and laws, it may be said that corresponding to this double aspect of citizenship, there is a separate and distinct range of privileges and immunities, guaranteed in each case by the government under which they arise. Thus Porto Rican citizenship involves a set of rights and obligations peculiarly local in their nature and depending for their existence and enforcement on the provisions of the Organic Act of the Island and the statutory laws enacted by the Porto Rican legislature thereunder. American citizenship, on the other hand, involves another set of rights and obligations, not necessarily different from the other, but of a universal and more comprehensive nature. These rights and obligations, which are implied in American citizenship depend for their existence and enforcement on the provisions of the Constitution and laws of the United States and the character of American institutions. It is then to these sources that the citizen must go in order to ascertain his rights and obligations under these two governments.

Respecting the civil and political rights of Porto Ricans under the American system of government, it may be said that, aside from any question relative to the existence or enforcement of a given right,

its enjoyment and exercise by the citizen may in many cases depend upon his local personal status or the international or constitutional status of the place wherein he resides. Thus, for instance, the right of suffrage may be made to depend by the local laws on various personal qualifications, such as sex, age, education, etc., and in this manner women, minors, illiterate persons, and lunatics, for example, although citizens, may be legally incompetent to exercise this right. Some able and learned writers have found in these persons who are thus deprived of the exercise of rights pertaining to citizenship, an argument to contend that there are, under the Constitution, qualified citizens or subjects. We submit that they are *disqualified persons* and that their disqualification has nothing to do with their citizenship. They are disqualified in their *personal status* as voters, eligibles for office, etc. The state, as a question of public policy, deprives the person, not the citizen, of the exercise of a given right, not because of any defect or qualification in his citizenship, but rather through a legal insufficiency in his personal qualification, which obliterates in him the legal capacity required for the intelligent exercise of that right which ordinarily belongs to him as a citizen.

Then again, the citizen may be unable to exercise a given right, as already said, on account of the international or constitutional status of the place wherein he resides, and thus, for instance, the inhabitants of Porto Rico are unable to take a direct part in the conduct of the national government, which is a peculiar right of the citizen. But this does not result from any inferiority or qualifications in their citizenship, but merely from a constitutional condition adversely affecting the status of Porto Rico. This proposition will be readily admitted when it is considered that, under the Constitution, the States and their people only, through their Senators and Representatives in Congress, have exclusive participation in the making of the national laws. So too, under the Constitution, the States and their people only have exclusive participation in the election of the President, who as the Chief Executive, is entrusted with the execution of the laws, and otherwise directs and controls, either by himself, as such Chief Executive, or by and with the advice and consent of the Senate, the general administration of the government and the conduct of foreign

relations, or, as Commander-in-Chief of the Army and Navy of the United States, the military activities thereof in case of war. The same is true as to the Vice-President, who substitutes for the President in the cases of emergency provided by the Constitution of the United States. It follows, therefore, that the inhabitants of Porto Rico, independent of their status as full-fledged citizens of the United States, and by virtue of the fact that Porto Rico is not a State, are unable to exercise such political rights as might otherwise belong to them as American citizens. This inability, of course, disappears for the individual Porto Rican as soon as he acquires residence within a State, because, as we will see hereinafter, by virtue of the Fourteenth Amendment of the Constitution he would become a citizen of such a State and therefore be entitled to the enjoyment of all rights, privileges and immunities as may appertain to him not only as a citizen of the United States, but also as a citizen of that particular State. Thus, conversely, while as a resident of a State he may be privileged, as a member of that body politic, to take part in that State's politics, as well as in the national politics, yet as a citizen of Porto Rico, as an American citizen residing in the Island, he can take a part and effective interest only in the local politics of Porto Rico, and not in the national politics of the United States.<sup>114</sup>

This apparently continued exclusion of the Porto Rican from taking part in the active political life of the nation has led some misinformed or disappointed persons to contend that the American citizenship granted to the Porto Ricans is a base, adulterated, and inferior citizenship of the United States, which merely imposes upon them burdensome obligations of citizenship,<sup>115</sup> without an adequate compensation in the enjoyment and exercise of rights which are con-

<sup>114</sup> In the case of *Am. Ins. Co. v. Canter* (1 Pet. 511), referring to the admission of the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of citizens of the United States, Chief Justice Marshall said: "They do not, however, participate in political power; they do not share in the government, till Florida shall become a State."

"The right of suffrage is a right which emanates from the State alone, irrespective of Federal interference." *Minor v. Happersett*, 21 Wall. 162.

<sup>115</sup> Porto Rico contributed more soldiers during the late war than the District of Columbia and all the Territories combined.

sidered as the most treasured possessions of the citizen. However true this contention may be in its ultimate results upon the Porto Ricans who are residing on the Island, it cannot be denied that there is, under the Constitution, only one legitimate citizenship of the United States, and that is the one kind of citizenship which has been extended to the Porto Ricans by the Jones-Shafroth Act.

As already stated, this condition, while thus adversely affecting the rights of Porto Ricans, finds its logical explanation only in the character of American institutions, and in the fact that Porto Rico is not a State of the Union. And let it be remembered here that this peculiar condition does not affect the *native* inhabitants of Porto Rico only, but it applies equally well to all such other American citizens who happen to be residing on the Island—and for that matter, in any other place outside of the individual States. It is to be remembered also, that the inhabitants of the so-called Territories are in no better condition, in this respect, than the Porto Ricans themselves. The District of Columbia is in the same position. It follows, therefore, that, contrary to unjustifiable assertions made in this respect, there is not in this condition any special discrimination or prejudice against the people of Porto Rico as such. It is a peculiar condition of American institutions, which finds no remedy except in Statehood.

It must be conceded, however, that so far as political rights of a national character are concerned, Porto Ricans are not much better off to-day than they were before the privilege of American citizenship was bestowed upon them; for while it may be true that any Porto Rican who removes into a State of the Union may acquire a direct participation in the National Government, yet with respect to the bulk of Porto Ricans remaining in the Island, the robe of citizenship may be considered by them as an empty honor without practical results, simply because their political rights as citizens will not take shape in a practical manner so long as their country is kept in the condition of a mere subservient piece of territorial property with no constitutional rights of representation in the making of the national laws.

On the other hand, it is to be observed that, as American citizens,

Porto Ricans are entitled to emigrate to foreign lands, or even to expatriate themselves by swearing allegiance to another sovereign; they may also, as such citizens, remove into the United States and acquire residence and citizenship in any State or Territory thereof,<sup>116</sup> or they may still decide to remain in Porto Rico and reside permanently therein. It is to be observed also that while the individual Porto Rican may choose to reside in one place or another, the extent and enforcement of his rights as such an American citizen are, of necessity, more or less controlled, as already suggested, by the status of his place of residence in respect to the United States. Thus, his rights as such citizen may be viewed from these four different points of view: (a) When residing in a foreign country; (b) when residing in a State of the Union; (c) when residing in a Territory of the United States; (d) when residing in Porto Rico.

(a) When residing abroad, there is no question that Porto Ricans, as American citizens, are entitled to demand full protection from the National Government. In this respect the words of Chief Justice Marshall, in 1804, in the case of *Murray v. Schooner Charming Betsy*,<sup>117</sup> are pertinent:

The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of our government; and if, without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American Government in his favor would be considered a justifiable interposition.

What this protection of the citizens abroad means and when and on what circumstances and to what extent it will be accorded by the interposition of the Government of the United States is another question which lies quite outside the scope of this article. It may be said, however, that in venturing to go abroad, the citizen enters into the sphere of international law and diplomacy, and mainly for this reason, he cannot always claim successfully the interposition of

<sup>116</sup> "Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns." By Justice Grier, in *Moore v. Illinois*, 14 How. 19. See also *Boyd v. Thayer*, 143 U. S. 161.

<sup>117</sup> 2 Cranch 64, 120.

his own government if he feels aggrieved or injured by the action or inaction of the foreign government. Moreover, in this matter of diplomatic protection of citizens abroad, it is to be observed that the action of the Department of State is, as a rule, controlled by a good many reasons affecting not only the legitimate rights of the citizen or citizens concerned, but also the national and international policies and superior interests of the United States as a nation. It follows, therefore, that this is a matter of much delicacy and discretion depending for a determination on all the surrounding circumstances of the case which the Department is to weigh and decide.<sup>118</sup> It may not be entirely amiss to state here that in this matter of diplomatic interposition by the Department of State in favor of American citizens abroad, there is no distinction whatever to be made between a Porto Rican and a Virginian, a Californian, or a New Yorker. In this question, as in any other relating to the privileges and immunities of American citizenship, all citizens of the United States are exactly upon the same legal footing.

(b) When residing in one of the States of the Union, the individual Porto Rican is, as already stated, invested with the full status of a citizen of that State. In an early case,<sup>119</sup> decided in 1832, Mr. Chief Justice Marshall said that "a citizen of the United States, residing in any State of the Union, is a citizen of that State." And this view was later incorporated into the opening clause of the Fourteenth Amendment to the Constitution: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

In this respect it may be pertinent to quote the words of Mr. Justice Miller in the *Slaughter House Cases*.<sup>120</sup> Referring to the privileges and immunities secured by the Constitution to the citizens of the United States, he said: "One of these privileges is conferred

<sup>118</sup> See Edwin M. Borchard, "Basic Elements of Diplomatic Protection of Citizens Abroad," in this JOURNAL, Vol. VII, pp. 497-520. See also in this connection a very interesting article by Alpheus Henry Snow in this JOURNAL, Vol. VIII, pp. 191-212.

<sup>119</sup> *Gassies v. Ballou*, 6 Pet. 731.

<sup>120</sup> 16 Wall. 79.



by the very Article under consideration.<sup>121</sup> It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State.”

As a citizen of the State wherein he resides, the individual Porto Rican must look to the Constitution and laws of that State in order to determine the extent of his rights therein. It must be remembered, however, that he is also entitled, under the protection of the National Government, to the enjoyment and exercise of these privileges and immunities which arise out of his American citizenship.<sup>122</sup>

The right of acquiring residence and citizenship in any State of the Union is indeed one of the greatest privileges of the citizens of the United States. In this respect it is to be observed that the individual Porto Rican who moves into any of the States, say, for instance, New York, with the intention of residing therein, acquires *ipso facto* the legal status of a New Yorker. He is therefore entitled and privileged to do, under the same circumstances and upon the same conditions, any thing which all other New Yorkers may do under the Constitution and laws of that State. He is, for all civil and political purposes, exactly the equal of the native citizens of that State, and thus he may vote and hold public office, and take part in the whole civil and political life of the State without molestation, according to law. There may be, however, some constitutional or statutory conditions prescribed for the entire community affecting a whole class of citizens, in which he may be included, and affecting his personal status, which may deprive him of the enjoyment or exercise of a given right or privilege. Thus, for instance, if he were a minor, an idiot or a convict, or if he did not possess the necessary qualifications for the purpose, he would not be entitled to the political franchise. But surely he would not be deprived of any privilege or immunity belonging to him as a citizen because of any defect or inferiority in his citizenship, and much less because of the fact that he is a Porto Rican.

In connection with the electoral franchise as affecting a direct

<sup>121</sup> Fourteenth Amendment to the Constitution, Sec. 1.

<sup>122</sup> For a comprehensive and yet brief study of the privileges and immunities of the citizens of the United States, see A. J. Lien, *op. cit.*, *supra*, note 107.

participation in the national politics, it seems interesting to observe that, although the right of suffrage is not one of the necessary privileges of a citizen of a State or of the United States,<sup>123</sup> when the individual Porto Rican, as a citizen of the State wherein he resides, is duly qualified to vote at an election at which members of Congress or presidential electors are being selected, he has the right, as a citizen of the United States, to exercise that privilege freely and without molestation. Referring to the general subject of the privileges and immunities secured by the Constitution to the citizens of the United States, said Mr. Justice Miller in a famous case:

It is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States. The office, if it be properly called an office, is created by that Constitution and by that alone. . . . The States in prescribing the qualifications of voters for the most numerous branch of their own legislature, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualifications for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualifications thus furnished as the qualifications of its own electors for members of Congress. It is not true, therefore, that electors for members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively on the law of that State.<sup>124</sup>

(c) When residing in a Territory of the United States, the individual Porto Rican is also, according to the established practice of the Government and even the decisions of the Supreme Court, a citizen of that Territory.<sup>125</sup> He enjoys therefore the same privileges and immunities secured to such citizens by the Organic Act and laws of the said Territory.

In this connection it may be useful to notice a fundamental distinction in the extent of the powers of the Federal Government, which must necessarily affect the rights of the citizen residing therein. This distinction is founded upon the equally fundamental distinction be-

<sup>123</sup> "The right of suffrage is not one of the necessary privileges of citizens of a State or of the United States." *Minor v. Happersett*, 21 Wall. 162.

<sup>124</sup> *Ex parte Yarbrough*, 110 U. S. 651, 662.

<sup>125</sup> *Mcroe v. Illinois*, 14 How. 19; *Boyd v. Thayer*, 143 U. S. 161.

tween the powers of the National Government and those which belong to the Governments of the various States,—that while the former is a government of enumerated powers and specific restrictions, the latter are governments of unlimited powers, except only such as have been delegated to the National Government or reserved by the people of the States to themselves. Thus, while the National Government must look to its Constitution to ascertain the extent of its powers, the State Governments do not have to do that, but they look to the Constitution of the United States and to their own Constitutions to ascertain merely the extent of the restrictions imposed by those instruments upon the exercise of their respective unlimited powers. There is no question that within their respective spheres of governmental powers, the National and State Governments are quite exclusive of each other and possess all the essential attributes of complete sovereignty for the successful discharge of their respective functions. Thus they can fix the political status and civil rights of their respective citizens within the extent of their respective powers.

Returning now to the main point under consideration, it may be safely assumed that by virtue of a constitutional necessity arising from the very nature of the case, in the government of the territory of the United States, outside of the States, Congress over and above its constitutional functions as the National Legislature, occupies, as to the territories, the same position as the State legislatures occupy with respect to their respective states.<sup>126</sup> And it must follow therefrom that in legislating for the territories the powers of Congress are quite as unlimited as the powers of the State legislatures are.<sup>127</sup> But carrying the comparison still somewhat further, the question arises whether in the exercise of its functions as a territorial government, the National Government is to be controlled by the restrictions imposed upon its national powers by the Federal Constitution,

<sup>126</sup> "Congress may legislate for territories as a State does for its municipal organizations." *First National Bank v. Yankton County*, 101 U. S. 129.

<sup>127</sup> "Congress has as full legislative power over the territories as a State has over its municipal corporations." *Utter v. Franklin*, 172 U. S. 416. Furthermore, "in legislating for the territories Congress exercises the combined powers of the General and State Governments. *Am. Ins. Co. v. Canter*, 1 Pet. 511.

just as the State Governments are controlled by their own Constitutions and the Constitution of the United States.

Aside from some loose language used in the adjudicated cases to the effect that the powers of Congress in legislating for the territories are plenary, absolute and complete, there is no question that, so far as those provisions of the Federal Constitution which absolutely deprive the National Government of all authority to act upon certain specific subjects are concerned, the powers of that Government are controlled and restricted by the said provisions, irrespective of time and place and are, therefore, controlling in the territories as well as anywhere else.<sup>128</sup>

But what about the other restrictions imposed upon the Federal Government by the Constitution of the United States? Do they apply in the Territories as well as in the States? Here Mr. Justice Brown, as we have already seen in the consideration of the case of *Downes v. Bidwell*,<sup>129</sup> said most emphatically No! Mr. Justice White said that the whole thing depends upon the status of the territory in question. These two different answers to the same question involve, of course, two conflicting theories of constitutional interpretation. Mr. Justice Brown's theory was that the Constitution does not apply to the territories unless and in so far as Congress shall in its wisdom see fit to extend it to them; this theory was, however, rejected by all the other members of the court. Mr. Justice White's theory was that, while the Constitution was intended to cover all parts of the United States, as composed of States and Territories, yet, in the nature of things, it could not apply to such territories as had not been as yet incorporated into the United States as integral parts thereof. It is evident, however, that, as to those other territories which have been already incorporated into the United States, like Alaska or the Hawaiian Islands, Congress will be effectively controlled by the Constitution when legislating for them.

The first proposition was peculiarly illustrated in the case of *Hawaii v. Mankichi*<sup>130</sup> where it was held that previous to the incorporation of those Islands into the United States, "the provisions of

<sup>128</sup> *Infra*, p. 522-3. See also, in this connection, *Am. Ins. Co. v. Canter*, *supra*.

<sup>129</sup> *Supra*, p. 488.

<sup>130</sup> 190 U. S. 197.

the Constitution as to grand and petit juries were not applicable to them.<sup>131</sup> The second proposition was also illustrated in a more recent Alaskan case, decided by the Supreme Court, in which it was held that since Alaska was an incorporated territory, the Constitution was applicable thereto, and that under the Fifth and Sixth Amendments Congress cannot deprive one there accused of a misdemeanor of trial by a common law jury, and that Section 171 of the Alaskan Code, in so far as it provided a jury composed of six persons for the trial of misdemeanors, was unconstitutional and void.<sup>132</sup>

It follows, therefore, that although effectively subjected to the complete and unlimited governmental powers of the National Government as his immediate sovereign, the individual Porto Rican residing in an incorporated Territory of the United States, such as Alaska or Hawaii, will be entirely protected in his rights as a citizen both of that Territory and of the United States against any encroachment by Congress thereon, in so far as the provisions of the Constitution of the United States may be applicable throughout the United States.

(d) With regard to the fourth and last point of view, namely, Porto Ricans residing in Porto Rico, other constitutional conditions are to be considered. In the first place, in view of the doctrine of non-incorporation,<sup>133</sup> Porto Rico is not a part of the United States, and, therefore, the provisions of the Constitution do not apply to the inhabitants of the Island except in so far as they operate to deprive Congress of power to act at all upon any given matter.

While it may be said that Congress has full powers to govern that Island without any constitutional restrictions whatever in respect to such provisions of the Constitution as regulate the powers granted to it by that instrument, it must not be inferred from this that Porto Ricans residing in the Island are entirely devoid of rights under the Constitution which Congress is not bound to respect. In this connection it may be useful to quote some excerpts from the

<sup>131</sup> To the same effect are *Dorr v. U. S.*, 195 U. S. 138, which is a Philippine case, and *The People of Porto Rico et al. v. Tapia*, and *The People of Porto Rico v. Muratti*, *supra*.

<sup>132</sup> *Rasmussen v. U. S.*, 197 U. S. 516.

<sup>133</sup> *Supra*, p. 499.

opinion of Mr. Justice Brown in the case of *Downes v. Bidwell*, which, although referring to a previous condition of Porto Ricans as mere inhabitants of newly acquired territory, must apply with greater force to their present status as citizens of the United States. Said this distinguished judge:

To sustain the judgment in the case under consideration it by no means becomes necessary to show that none of the articles of the Constitution apply to the Island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only throughout the United States or among the several States. . . .

We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage, and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals.

Whatever may be finally decided by the American people as to the *status* of these Islands and their inhabitants—whether they shall be introduced into the sisterhood of States or be permitted to form independent governments—it does not follow that, in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution, and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty and property. This has been frequently held by this court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States. We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect.

Mr. Justice White's remarks upon this question are also very important and clear. In discussing this subject with respect to the doctrine by him announced and sustained, he said:

Albeit, as a general rule, the *status* of a particular territory has to be taken in view when the applicability of any provision of the Constitution is questioned, it does not follow when the Constitution has absolutely withheld from the government all power on a given subject, that such an inquiry is necessary. Undoubtedly, there are general prohibitions in the Constitution in favor of the liberty and property of the citizen which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character cannot be under any circumstances transcended, because of the complete absence of power.

The distinction which exists between the two characters of restrictions, those which regulate a granted power and those which withdraw all authority on a particular subject, has in effect been always conceded, even by those who most strenuously insisted on the erroneous principle that the Constitution did not apply to Congress in legislating for the territories, and was not operative on such districts of country. . . .

There is in reason then no room in this case to contend that Congress can destroy the liberties of the people of Porto Rico by exercising in their regard powers against freedom and justice which the Constitution has absolutely denied.

There is no doubt, however, that in the matter of such rights as are not secured to the citizen by specific prohibitions of the Constitution operating upon the powers of Congress to act at all irrespective of time and place, the civil and political rights of Porto Ricans residing in the Island are to be determined and measured only by the Organic Act which Congress shall in its wisdom be pleased to give to the Island,<sup>134</sup> and by the laws which may be enacted by the Legislature of Porto Rico thereunder.<sup>135</sup>

<sup>134</sup> See *Murphy v. Ramsey*, 114 U. S. 15, cited in *Downes v. Bidwell*, *supra*.

<sup>135</sup> Owing to the restrictive nature of this JOURNAL, we must leave for consideration elsewhere the Government of Porto Rico under Spain and the two Organic Acts so far enacted by Congress for the Island, as well as the Porto Rican problem which is now confronting the American people, and its possible solution in the near future. See "Some Historical and Political Aspects of the Government of Porto Rico," in *The Hispanic-American Historical Review*, Vol. II, No. 4.

As showing the real attitude of Congress towards the inhabitants of Porto Rico in respect to these matters, reference will be made to the Bill of Rights inserted in the recent Organic Act adopted for the Island, in which it is expressly provided:

That no law shall be enacted in Porto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws.

That in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense, to be informed of the nature and cause of the accusation, to have a copy thereof, to have a speedy and public trial, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor.

That no person shall be held to answer for a criminal offense without due process of law; and no person for the same offense shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself.

That all persons shall before conviction be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.

That no law impairing the obligation of contracts shall be enacted.

That no persons shall be imprisoned for debt.

That the privilege of the writ of *habeas corpus* shall not be suspended, unless when in case of rebellion, insurrection, or invasion, the public safety may require it, in either of which events the same may be suspended by the President, or by the Governor, whenever during such period the necessity for such suspension shall exist.

That no *ex post facto* law or bill of attainder shall be enacted.

Private property shall not be taken or damaged for public use except upon payment of just compensation ascertained in the manner provided by law.

Nothing contained in this Act shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health or safety of employees.

That no law granting a title of nobility shall be enacted, and no person holding any office of profit or trust under the Government of Porto Rico shall, without the consent of the Congress of the United States, accept any present, emolument, office, or title of any kind whatever from any king, queen, prince, or foreign state, or any officer thereof.

That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

That the right to be secure against unreasonable searches and seizures shall not be violated.



That no warrant for arrest or search shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

That slavery shall not exist in Porto Rico.

That involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall not exist in Porto Rico.

That no law shall be passed abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances.

That no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed, and that no political or religious test other than an oath to support the Constitution of the United States and the laws of Porto Rico shall be required as a qualification to any office or public trust under the Government of Porto Rico.

That no public money or property shall ever be appropriated, applied, donated, used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution or association, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary as such, or for charitable, industrial, educational, or benevolent purposes to any person, corporation, or community not under the absolute control of Porto Rico. Contracting of polygamous or plural marriages hereafter is prohibited.

That no money shall be paid out of the treasury except in pursuance of an appropriation by law, and on warrant drawn by the proper officer in pursuance thereof.

That the rule of taxation in Porto Rico shall be uniform.

That all money derived from any tax levied or assessed for a special purpose shall be treated as a special fund in the treasury and paid out for such purpose only, except upon the approval of the President of the United States.

That eight hours shall constitute a day's work in all cases of employment of laborers and mechanics by and on behalf of the Government of the Island on public works, except in cases of emergency.

That the employment of children under the age of fourteen years in any occupation injurious to health or morals or hazardous to life or limb is hereby prohibited.

PEDRO CAPÓ-RODRÍGUEZ.

## EDITORIAL COMMENT

### ANNOUNCEMENT

OWING to the great length of the Treaty of Peace with Germany signed at Versailles on June 28th, the English text of which we are printing in the Supplement to the present number of the JOURNAL, it has been necessary to reduce the normal size of the JOURNAL itself. This has been done by reducing the amount of printed matter in all of the departments of the JOURNAL and omitting three departments, the contents of which may be carried over to the next number without impairing its value to the readers of the JOURNAL, namely, the Chronicle of International Events, the list of Public Documents Relating to International Law, and the list of Periodical Literature of International Law. The period covered by these three departments in the October number will take in the events, documents and literature since the April number was issued.

It is expected to print in the October number the supplemental agreements which were coincident with the signature of the principal treaty with Germany. This will bring together in the bound volume of the Supplement the leading documents relating to the peace settlement with Germany.

### THE RATIFICATION OF TREATIES WITH RESERVATIONS

Treaties are ratified, in the technical sense, between governments by the exchange or deposit of an act of ratification which is an official document setting out in full the treaty in the final form approved by the treaty-making power of the contracting parties.

In the case of two-party treaties the authorized representative of each party delivers a document or act of this character to the other, and this exchange constitutes the ratification; and the acceptance by each of the others act of ratification evidences their agreement upon any reservations or changes, the acceptance of which has been made a condition of ratification.

In the case of multi-party treaties where the exchange of an act of ratification by each party with each of the other parties would be an inconvenient or cumbersome proceeding, a different mode of procedure is adopted. The usual method of recording the ratification of multi-party treaties is for the representatives of the signatories to meet and sign a *procès verbal* of ratification, reciting therein that the acts of ratification of the several parties have been examined and found to be in proper form, and have been duly deposited, etc. In this way any reservations made by any of the parties are brought to the attention of all the others, and the treaty is ratified by them, subject to and with notice of such reservations.

It is customary to notify other governments in advance of reservations to be inserted in the act of ratification and to ascertain whether or not they will be acceptable.

Pursuant to the requirements of the Constitution of the United States of America, reservations by other Governments, which are to bind the United States, must be submitted to the Senate of the United States for its advice and consent, inasmuch as such reservations will form part of the treaty and must be passed upon by the treaty-making power of the United States, which comprises both the President and the Senate, each having a veto power over the other.

This procedure was followed in the case of the African Slave Trade Convention of 1890. A reservation was made by the French Government in its ratification of this convention, and the Senate of the United States in authorizing the ratification by the United States expressly recited in its resolution of ratification its acceptance of the partial ratification of the French Government.

In many treaties to which the United States is a party, important reservations or modifications, not made by the United States delegates prior to signing, have been incorporated in the treaty by the act of ratification as conditions of ratification required by the Senate. For instance, the 1907 Hague Convention II concerning the Limitation of the Employment of Force for Recovering Contractual Debts was signed by the United States delegates without reservation, but the resolution of ratification of the United States Senate (April 17, 1908) contained the following reservation:

Resolved further, as a part of this act of ratification, that the United States approves this convention with the understanding that recourse to the permanent court for the settlement of the disputes referred to in said convention can be

had only by agreement thereto through general or special treaties of arbitration heretofore or hereafter concluded between the parties in dispute.

On November 27, 1909, a representative of the United States filed with the Netherlands Government the act of ratification of the United States containing the above reservation, and the representatives of Austria-Hungary, Germany, Great Britain, Mexico, Netherlands, Russia and the United States signed a *procès verbal* setting forth that they had assembled to deposit the acts of ratification of their respective Governments to this convention, and that these having been presented and found in good and proper form, were confided to the Minister of Foreign Affairs of the Netherlands to be deposited in the Royal Archives, and that a certified copy of the *procès verbal* would be transmitted to all the Powers participating in the Second Hague Conference and to those adhering to this convention. It does not appear that any further formalities were required to show the acceptance by the other Powers of these reservations.

So also in the Hague Convention of 1907 for the Pacific Settlement of International Disputes, the United States Senate in its resolution of ratification of April 2, 1908, required as a condition of ratification that the following reservation be included in the treaty in addition to a reservation made by the American delegates at the time of signing the treaty:

Resolved further, as a part of this act of ratification, That the United States approves this convention *with the understanding* that recourse to the permanent court for the settlement of differences can be had only by agreement thereto through general or special treaties of arbitration heretofore or hereafter concluded between the parties in dispute; and the United States *now exercises the option* contained in article fifty-three of said convention, to exclude the formulation of the "compromis" by the permanent court, and hereby excludes from the competence of the permanent court the power to frame the "compromis" required by general or special treaties of arbitration concluded or hereafter to be concluded by the United States, and further *expressly declares* that the "compromis" required by any treaty of arbitration to which the United States may be a party shall be settled only by agreement between the contracting parties, unless such treaty shall expressly provide otherwise.

Another example of the exercise of this authority by the United States Senate is found in the Hague Convention of 1907 concerning the Rights and Duties of Neutral Powers in Naval War, which was not signed by the United States, and the Senate resolution advising

and consenting to the adherence of the United States to this convention contained the following reservation:

*reserving and excluding*, however, Article XXIII thereof, which is in the following words:

A neutral power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a prize court. It may have the prize taken to another of its ports.

If the prize is convoyed by a war ship, the prize crew may go on board the convoying ship.

If the prize is not under convoy, the prize crew are left at liberty.

Resolved further, That the United States adheres to this convention *with the understanding* that the last clause of Article III *implies* the duty of a neutral power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction.

Another precedent is found in the Algeciras Convention of April 7, 1906. In this case the Senate's resolution of ratification (December 12, 1906) contained the following reservation, which differs materially from a reservation made by the United States delegates at the time of signing:

Resolved further, that the Senate, as a part of this act of ratification, *understands* that the participation of the United States in the Algeciras conference and in the formation and adoption of the general act and protocol which resulted therefrom, was with the *sole purpose* of preserving and increasing its commerce in Morocco, the protection as to life, liberty and property of its citizens residing or traveling therein, and of aiding by its friendly offices and efforts, in removing friction and controversy which seemed to menace the peace between powers signatory with the United States to the treaty of 1880, all of which are on terms of amity with this Government; and *without purpose* to depart from the traditional American foreign policy which forbids participation by the United States in the settlement of political questions which are entirely European in their scope.

Italics have been used to emphasize certain words in the above quotations for the purpose of calling attention to the extent and variety of the reservations which the United States Senate has thought advisable to insist upon in the exercise of its authority as part of the treaty-making power.

The mode of procedure indicated by the above precedents has been adopted for the ratification of the Peace Treaty with Germany. It provides in one of its closing clauses that the first *procès verbal*

of the deposit of ratifications will be drawn up as soon as it has been ratified by Germany, on the one hand, and by three of the Principal Allied and Associated Powers on the other hand; thus indicating that this *procès verbal* is to be followed by others as other nations ratify, so that each party in turn will be given an opportunity to record its acceptance of any reservations which may be proposed.

Considering the effect of reservations in the ratification of the treaty of peace, it should be noted that this treaty is multi-lateral only so far as the League of Nations Covenant is concerned. All of the high contracting parties, including Germany, agree indiscriminately to the Covenant, although Germany is excluded from participation in the League, and consequently the terms of the Covenant may be changed by the members of the League without consulting Germany. The rest of the treaty is bi-lateral, the parties being the Allied and Associated Powers, on the one part, and Germany on the other part. Two different kinds of treaties are thus combined in the treaty of peace.

It must be noted further that there is no provision in the peace treaty making its coming into force dependent upon ratification by all the signatories. On the contrary, it is expressly provided in the fourth clause from the last that the treaty will enter into force for each Power at the date of the deposit of its ratification. Furthermore, the treaty provides in the introductory clauses that "from the coming into force of the present treaty the state of war will terminate."

It would seem to follow from these considerations that although all of the parties except Germany would be concerned in reservations as to the Covenant, none of the Allied and Associated Powers would be concerned purely as a question of law in reservations exempting the United States from adherence to any or all of the other provisions of the treaty.

CHANDLER P. ANDERSON.

#### THE SHANTUNG CESSION

Articles 156-158, Section VIII, Part IV of the Treaty of Peace with Germany contain the following provisions relating to Shantung Province:

Art. 156. Germany renounces, in favour of Japan, all her rights, title and privileges—particularly those concerning the territory of Kiaochow, railways, mines and submarine cables—which she acquired in virtue of the Treaty con-

cluded by her with China on March 6, 1898, and of all other arrangements relative to the Province of Shantung.

All German rights in the Tsingtao-Tsinanfu Railway, including its branch lines, together with its subsidiary property of all kinds, stations, shops, fixed and rolling stock, mines, plant and material for the exploitation of the mines, are and remain acquired by Japan, together with all rights and privileges attaching thereto:

The German State submarine cables from Tsingtao to Shanghai and from Tsingtao to Chefoo, with all the rights, privileges and properties attaching thereto, are similarly acquired by Japan, free and clear of all charges and encumbrances.

Art. 157. The movable and immovable property owned by the German State in the territory of Kiaochow, as well as all the rights which Germany might claim in consequence of the works or improvements made, or of the expenses incurred by her, directly or indirectly, in connection with this territory, are and remain acquired by Japan, free and clear of all charges and encumbrances.

Art. 158. Germany shall hand over to Japan, within three months from the coming into force of the present Treaty, the archives, registers, plans, title-deeds and documents of every kind, wherever they may be, relating to the administration, whether civil, military, financial, judicial or other, of the territory of Kiaochow.

Within the same period Germany shall give particulars to Japan, of all treaties, arrangements or agreements relating to the rights, title or privileges referred to in the two preceding articles.<sup>1</sup>

In order to understand what "rights, title, and privileges" Japan has thus acquired in the Chinese province of Shantung, it is necessary to examine the convention of March 6, 1898, between Germany and China respecting the lease of Kiaochow. As is well known, this treaty was extorted by Germany from China by a display of force, but the use of coercion of this kind on the part of a government, even though really an act of national brigandage, has never been regarded as having the effect of invalidating a treaty.

The Kiaochow Convention of 1898<sup>2</sup> is divided into three sections. Section I, consisting of five articles, relates to such matters as rights of German troops, the term and purpose of the lease, the limits of the territory leased, the rights of Chinese vessels in Kiaochow Bay, the rights of the Chinese population in the ceded territory, etc.

The terms and purpose of the lease are thus set forth in Article II:

With the intention of meeting the legitimate desire of His Majesty the German Emperor, that Germany, like other Powers, should hold a place on the

<sup>1</sup> Senate document No. 49, 66th Cong., 1st sess., p. 70.

<sup>2</sup> Translation from the German text as printed in *Customs*, Vol. II, p. 208.

Chinese coast for the repair and equipment of her ships, for the storage of materials and provisions for the same, and for other arrangements connected therewith, His Majesty the Emperor of China cedes to Germany on lease, provisionally for ninety-nine years, both sides of the entrance to the Bay of Kiaochow. Germany engages to construct, at a suitable moment, on the territory thus ceded, fortifications for the protection of the buildings to be constructed there and of the entrance to the harbour.

Art. III defines the limits of the territory leased:

In order to avoid the possibility of conflicts, the Imperial Chinese Government will abstain from exercising rights of sovereignty in the ceded territory during the term of the lease, and leaves the exercise of the same to Germany within the following limits:

- (1) On the northern side of the entrance to the bay:

The peninsula bounded to the north-east by a line drawn from the north-eastern corner of Potato Island to Loshan Harbour.

- (2) On the southern side of the entrance to the bay:

The peninsula bounded to the south-west by a line drawn from the southwesternmost point of the bay lying to the south-south-west of Chiposan Island in the direction of Tolosan Island.

- (3) The Island of Chiposan and Potato Island.

- (4) The whole water area of the bay up to the highest water-mark at present known.

- (5) All islands lying seaward from Kiaochow Bay, which may be of importance for its defence, such as Tolosan, Chilianchow, etc.

It should be noted that the lease covers a very restricted territory (including a water as well as a land area) within the limits of which the Chinese Government agrees to "abstain from exercising the rights of sovereignty." It is not clear whether these rights of sovereignty are theoretically or abstractly reserved to China, as, for example, was done in the case of the lease of Port Arthur to Russia, where it was expressly stated that "this act of lease, however, in no way violates the sovereign rights of His Majesty the Emperor of China to the above-mentioned territory (Art. I of the Convention for the lease of the Liaotung Peninsula, March 27, 1898).<sup>3</sup> The language used in the last paragraph of Article III of the Kiaochow Convention would appear to support the view that there was a theoretical and legal as well as actual transfer of sovereignty to Germany.

This paragraph reads:

Chinese ships of war and merchant-vessels shall enjoy the same privileges in the Bay of Kiaochow as the ships of other nations on friendly terms with

<sup>3</sup> Supplement to this JOURNAL, Vol. 4, p. 289.



Germany; and the entrance, departure, and sojourn of Chinese ships in the bay shall not be subject to any restrictions other than those which the Imperial German Government, in virtue of the rights of sovereignty over the whole of the water area of the bay transferred to Germany, may at any time find it necessary to impose with regard to the ships of other nations.

There is, however, no question as to the express reservation of sovereignty by China in the zone surrounding Kiaochow Bay. In Article I the Emperor of China

engages, while reserving to himself all rights of sovereignty in a zone of 50 kilometres (100 Chinese *li*) surrounding the Bay of Kiaochow at high-water, to permit the free passage of German troops within this zone at any time, as also to abstain from taking any measures, or issuing any Ordinances therein, without the previous consent of the German Government, and especially to place no obstacle in the way of any regulation of the water-courses which may prove to be necessary.

The rights of the Chinese population residing in the leased territory are thus safeguarded in Article V:

The Chinese population dwelling in the ceded territory shall at all times enjoy the protection of the German Government, provided that they behave in conformity with law and order; unless their land is required for other purposes they may remain there.

If land belonging to Chinese owners is required for any other purpose, the owner will receive compensation therefor.

Section II, concerning "Railway and Mining Affairs" requires citation in full.

Art. I. The Chinese Government sanctions the construction by Germany of two lines of railway in Shantung. The first will run from Kiaochow via Weihsien, Tsingchofu, Poshan, Tzechwan, and Tsowping to Tsinan and the boundary of Shantung. The second line will run from Kiaochow to Ichowfu, and from there to Tsinan via Laiwuhsien. But the construction of the extension from Tsinan to the boundary of Shantung shall not be begun until the railway is completed as far as Tsinan in order that further consideration may be given by the Chinese as to how they will connect this with their own trunk line. The route to be taken by this last branch will be definitely determined in the regulations which will be drawn up hereafter.

Art. II. In order to carry out the above-mentioned railway work, a Chino-German Company shall be formed. This Company may have offices in one place or in several places, and both German and Chinese merchants shall be at liberty to invest money therein, and share in the appointment of directors for the management of the undertaking.

Art. III. Germany and China shall in the near future draw up a further agreement relative to the management of the railway by the Company, and all matters pertaining thereto shall be discussed and decided upon by these two countries alone. But the Chinese Government shall afford every facility to the Chino-German Company in the construction of the road, and it shall enjoy all the advantages and benefits extended to other Chinese-foreign companies operating in China. It is understood that the object of this agreement is solely the development of commerce, and in constructing this railroad there is no intention to unlawfully seize any land in the Province of Shantung.

Art. IV.—The Chinese Government will allow German subjects to hold and develop mining property for a distance of thirty *li* from each side of those railways and along the whole extent of the lines. The following places where mining operations may be carried on are particularly specified: Weihsien and Poshan along the line of the northern railway from Kiaochow to Tsinan, and Ichow, Laiwuhsien, etc., along the southern or Kiaochow-Ichow-Tsinan line. Both German and Chinese capital may be invested in these mining and other operations, but as to the rules and regulations relating thereto, this shall be left for future consideration. The Chinese Government shall afford every facility and protection to German subjects engaged in these works, just as provided for above in the article relating to railway construction, and all the advantages and benefits shall be extended to them that are enjoyed by the members of other Chinese-foreign companies. The object in this case is also the development of commerce solely.

And Section III, relating to "Commercial Operations in Shantung," reads as follows:

The Chinese Government binds itself in all cases where foreign assistance, in persons, capital or material, may be needed for any purpose whatever within the Province of Shantung, to offer the said work or supplying of materials in the first instance to German manufacturers and merchants engaged in undertakings of the kind in question. In case German manufacturers or merchants are not inclined to undertake the performance of such works, or the furnishing of materials, China shall then be at liberty to act as she pleases.

As a result of Japan's ultimatum of May 7, 1915, China signed on May 25 and ratified on June 8, 1915, the following Treaty respecting the Province of Shantung:<sup>4</sup>

Article I. The Chinese Government agrees to give full assent to all matters upon which the Japanese Government may hereafter agree with the German Government relating to the disposition of all rights, interests and concessions which Germany, by virtue of treaties or otherwise, possesses in relation to the Province of Shantung.

<sup>4</sup> Hornbeck, *Contemporary Politics in the Far East*, p. 332.

Art. II. The Chinese Government agrees that as regards the railway to be built by China herself from Chefoo or Lungkow to connect with the Kiaochow-Tsinanfu railway, if Germany abandons the privilege of financing the Chefoo-Weihsien line, China will approach Japanese capitalists to negotiate for a loan.

Art. III. The Chinese Government agrees in the interest of trade and for the residence of foreigners, to open by China herself as soon as possible certain suitable places in the Province of Shantung as Commercial Ports.

Art. IV. The present treaty shall come into force on the day of its signature.

On the same date (June 8, 1915), in an Exchange of Notes between the two Governments, Japan agreed to restore the leased territory of Kiaochow Bay to China on these conditions: <sup>5</sup>

1. The whole of Kiaochow Bay to be opened as a Commercial Port.
2. A concession under the exclusive jurisdiction of Japan to be established at a place designated by the Japanese Government.
3. If the foreign Powers desire it, an international concession may be established.
4. As regards the disposal to be made of the buildings and properties of Germany and the conditions and procedure relating thereto, the Japanese Government and the Chinese Government shall arrange the matter by mutual agreement before the restoration.

During the recent discussions as to the disposal of Japan's conquests made during the war at the Paris Peace Conference, it came to light that Great Britain, France, Italy, and Russia, by an Exchange of Notes with Japan in February, 1919, had agreed to "support Japan's claims in regard to the disposal of Germany's rights in Shantung and possessions in the islands north of the equator on the occasion of the Peace Conference."<sup>6</sup>

The above are the main official documents on which the rights and privileges that Japan has acquired in Shantung will be based. They are thus summarized by one of the leading authorities on contemporary politics in the Far East:

The territory leased to Germany in March, 1898, included the Bay of Kiaochow and its immediate environment, some 400 square miles in all, to be held and administered by Germany for 99 years. In the immediate hinterland a neutral zone involving some 2,500 square miles was established. Germany was given the right to build two lines of railway in the province and to open mines along the lines; also a guaranty that German capital, assistance, and materials

<sup>5</sup> Hornbeck, *op. cit.*, pp. 333-334.

<sup>6</sup> See *New York Times*, April 22, 1919. The above citation is from the British note.

should be sought first in case the Chinese chose to develop the province with foreign aid.<sup>7</sup>

Upon the question of the obligation of Japan, whether moral or legal, to restore Kiaochow to China, we do not propose to enter. Indeed, it does not seem to us particularly important. Even if the so-called "restoration" be made, it will probably be upon such conditions as would leave Japan in virtual or actual political and economic control of the Shantung Province, and therefore with a firm grip on China. As a distinguished Chinese politician and diplomatist has expressed it, "she (Japan) will give us back the shells and keep the oysters."<sup>8</sup>

AMOS S. HERSHEY.

#### THE PEACE NEGOTIATIONS WITH GERMANY<sup>1</sup>

"It is neither the time nor the place for superfluous words. . . . The time has come when we must settle our account." In this plain, curt, business-like language, the negotiations for the restoration of peace, requested by the German Government of the President of the United States on October 6, 1918, were opened by Premier Clemenceau at Versailles on May 7, 1919.

The time was the fourth anniversary of the sinking of the *Lusitania*, and the place was the scene of Germany's peace of conquest, dictated to France in 1871. Perhaps the long series of barbarous crimes on land and sea of which the former event was merely typical and the ineffaceable memory of the half century of injustice which the latter event meant to France, inspired the language of the veteran French statesman who acted as spokesman for the twenty-seven nations, great and small, which Germany's unsuccessful attempt to repeat her triumphs of conquest of 1871 on a more ambitious scale in 1914-1918 had forced into the war of self-defense against her. Undoubtedly M. Clemenceau's words were intended to impress upon the German delegates that the terms of peace to be presently handed to them, which had been formulated and agreed upon by the Allied and

<sup>7</sup> Hornbeck, *op. cit.*, p. 295.

<sup>8</sup> Dr. C. T. Wang, in *The Outlook*, June 25, 1918.

<sup>1</sup> Except where otherwise stated, the quotations and other references to documents are taken from the English translations appearing in the *New York Times Current History* for June, July and August, 1919.

Associated Powers after months of arduous deliberations, were substantially final, and that Germany must be prepared without dicker or barter to settle the account which the outraged world had found to be due from her. "This second treaty of Versailles," continued M. Clemenceau, "has cost us too much not to take on our side all the necessary precautions and guarantees that the peace shall be a lasting one."

He informed the German plenipotentiaries that "no oral discussion is to take place and the observations of the German delegation will have to be submitted in writing." Every facility and the time necessary to examine the conditions would be granted, he stated, and the Allies were ready to give any explanations desired and to receive any observations the Germans might have to offer; but they would have a maximum period of two weeks in which to present written observations on the treaty.

On behalf of the German delegation, Count von Brockdorff-Rantzau read a prepared reply in which it was denied that Germany was solely responsible for the war and that the crimes of war were confined to Germany and her allies. Confessing that Germany's military power had been broken, the chief German delegate stated that he relied for a peace of justice upon President Wilson's principles, which, by their acceptance as the basis of negotiations, had become binding upon both parties to the war.

The proceedings were then closed and the plenipotentiaries did not meet again until the formal signature of the treaty on June 28.

In less than 400 spoken words, Premier Clemenceau had presented to Germany the draft of a treaty of peace which, according to a semi-official summary given out at Paris, is the longest treaty ever drawn.<sup>2</sup> It totals about 80,000 words divided into fifteen main sections and represents the combined product of over a thousand experts working continually through a series of commissions for the three and a half months from January 18. The treaty is printed in parallel pages of English and French, which are recognized as having equal validity. It does not deal with questions affecting Austria, Bulgaria and Turkey except in so far as binding Germany to accept any agreement reached with those former allies.

<sup>2</sup> The draft treaty had been submitted to and approved by the Preliminary Peace Conference of the Allied and Associated Powers at Paris, in plenary session, on May 6, 1919.

Following the preamble and deposition of Powers comes the Covenant of the League of Nations as the first section of the treaty. The frontiers of Germany in Europe are defined in the second section; European political clauses given in the third; and extra-European political clauses in the fourth. Next are the military, naval, and air terms as the fifth section, followed by a section on Prisoners of War and Military Graves and a seventh on Responsibilities. Reparations, financial terms, and economic terms are covered in sections eight to ten. Then comes the Aeronautic section, ports, waterways, and railways section, the Labor Covenant, the section on guarantees, and the final clauses.

Germany, by the terms of the treaty, restores Alsace-Lorraine to France, accepts the internationalization of the Saar Basin temporarily and of Danzig permanently, agrees to territorial changes towards Belgium and Denmark and in East Prussia, cedes most of Upper Silesia to Poland, and renounces all territorial and political rights outside of Europe, as to her own or her allies' territories, and especially as to Morocco, Egypt, Siam, Liberia, and Shantung. She also recognizes the total independence of German Austria, Tchecho-Slovakia, and Poland.

Her army is reduced to 100,000 men including officers; conscription within her territories is abolished; all forts fifty kilometers east of the Rhine razed; and all importation, exportation and nearly all production of war material stopped. Allied occupation of parts of Germany will continue till reparation is made, but will be reduced at the end of each of three five-year periods if Germany is fulfilling her obligations. Any violation by Germany of the conditions as to the zone 50 kilometers east of the Rhine will be regarded as an act of war.

The German navy is reduced to six battleships, six light cruisers, and twelve torpedo-boats, without submarines and with a personnel of not over 15,000. All other vessels must be surrendered or destroyed. Germany is forbidden to build forts controlling the Baltic, must demolish Heligoland, open the Kiel Canal to all nations, and surrender her fourteen submarine cables. She may have no military or naval air forces except 100 unarmed seaplanes until October 1st to detect mines, and may manufacture no aviation material for six months.

Germany accepts full responsibility for all damages caused to

Allied and Associated Governments and nationals, and agrees specifically to reimburse all civilian damages, beginning with an initial payment of 20,000,000,000 marks, subsequent payments to be secured by bonds to be issued at the discretion of the Reparation Commission. Germany is to pay shipping damage on a ton-for-ton basis by cession of a large part of her merchant, coasting, and river fleets and by new construction; and to devote her economic resources to the rebuilding of the devastated regions.

She agrees to return to the 1914 most-favored-nation tariffs, without discrimination of any sort; to allow Allied and Associated nationals freedom of transit through her territories, and to accept highly detailed provisions as to pre-war debts, unfair competition, internationalization of railroads and rivers, and other economic and financial clauses. She also agrees to the trial of the ex-Kaiser by an international high court for a supreme offense against international morality, and of other nationals for violations of the laws and customs of war, Holland to be asked to extradite the former and Germany being responsible for delivering the latter.

The League of Nations is accepted by the Allied and Associated Powers as operative upon ratification of the treaty and by Germany in principle but without membership. Similarly an international Labor Body is brought into being with a permanent office and an annual convention. A great number of international bodies of different kinds and for different purposes are created, some under the League of Nations, some to execute the peace treaty. Among the former is the commission to govern the Saar Basin until a plebiscite is held fifteen years hence; the internationalized Free City of Danzig guaranteed by the League and under a high commissioner appointed by it; and various commissions for plebiscites in Malmedy, Schleswig, and East Prussia. Among those to carry out the peace treaty are the Reparations, Military, Naval, Air, Financial, and Economic Commissions, the International High Court and military tribunals to fix responsibilities, and a series of bodies for the control of international rivers.

Certain problems are left for solution between the Allied and Associated Powers, notably details of the disposition of the German fleet and cables, the former German colonies, and the values paid in reparation. Certain other problems, such as the laws of the air and

the opium, arms and liquor traffic, are either agreed to in detail or set for early international action.

During the interval between the opening and closing sessions at Versailles, the negotiations were conducted by the interchange of written communications, as prescribed by the Allies. The first of these was a protest of a general nature from Count von Brockdorff-Rantzau on May 9th, in which he stated that a perusal of the peace conditions showed that "on essential points the basis of the peace of right agreed upon between the belligerents has been abandoned" and that "the draft of the treaty contains demands which no nation could endure." M. Clemenceau replied promptly on May 10th that the terms of the treaty had been formulated "with constant thought of the principles upon which the armistice and the negotiations for peace were proposed," that the Allies "could admit no discussion of their right to insist on the terms of the peace substantially as drafted," and can consider "only such practical suggestions as the German plenipotentiaries may have to submit."

Thereupon the German delegation proceeded to send a series of separate notes concerning particular portions of the terms. They made persistent efforts to bring about oral discussions by suggesting the establishment of special commissions to confer upon and settle the details of the execution of certain sections of the treaty. They transmitted counter proposals on the question of the League of Nations and the agreement on labor legislation. They objected to the provisions regarding repatriation of prisoners of war and interned civilians, the sections on responsibility for the war and reparations, territorial adjustments and the financial and economic provisions. To all of these the Allies gave prompt replies, unequivocally maintaining their terms as submitted to the Germans.

The time limit of two weeks set for the reception of the complete German reply expired on May 21. On May 20th the German delegation stated that it would be impossible to hand in their complete reply within the time allowed, and asked for an extension, which was granted until May 29th. On that date, observations on the entire treaty, including the substance of the notes previously exchanged, were handed to the Allies by the German delegation. These observations were considered until June 16th, when the Allies made a detailed reply to them. Both the German observations and the Allied reply are very bulky documents. They were accompanied by covering letters



giving general summaries of the contents of the documents. These letters are reproduced below:

*Letter transmitting German observations on the draft Treaty of Peace*<sup>3</sup>

MR. PRESIDENT:

I have the honor to transmit to you herewith the observations of the German delegation on the draft Treaty of Peace. We came to Versailles in the expectation of receiving a peace proposal based on the agreed principles. We were firmly resolved to do everything in our power with a view of fulfilling the grave obligations which we had undertaken. We hoped for the peace of justice which had been promised to us. We were aghast when we read in documents the demands made upon us, the victorious violence of our enemies. The more deeply we penetrate into the spirit of this treaty, the more convinced we become of the impossibility of carrying it out. The exactions of this treaty are more than the German people can bear.

With a view to the reestablishment of the Polish state we must renounce indisputably German territory—nearly the whole of the Province of West Prussia, which is preponderantly German; of Pomerania; Danzig, which is German to the core; we must let that ancient Hanse town be transformed into a free state under Polish suzerainty. We must agree that East Prussia shall be amputated from the body of the state, condemned to a lingering death, and robbed of its northern portion, including Memel, which is purely German. We must renounce Upper Silesia for the benefit of Poland and Czechoslovakia, although it has been in close political connection with Germany for more than 750 years, is instinct with German life, and forms the very foundation of industrial life throughout East Germany.

Preponderantly German circles (Kreise) must be ceded to Belgium, without sufficient guarantees that the plebiscite, which is only to take place afterward, will be independent. The purely German district of the Saar must be detached from our empire, and the way must be paved for its subsequent annexation to France, although we owe her debts in coal only, not in men.

For fifteen years Rhenish territory must be occupied, and after those fifteen years the Allies have power to refuse the restoration of the country; in the interval the Allies can take every measure to sever the economic and moral links with the mother country, and finally to misrepresent the wishes of the indigenous population.

Although the exaction of the cost of the war has been expressly renounced, yet Germany, thus cut in pieces and weakened, must declare herself ready in principle to bear all the war expenses of her enemies, which would exceed many times over the total amount of German state and private assets.

Meanwhile her enemies demand, in excess of the agreed conditions, reparation for damage suffered by their civil population, and in this connection Germany must also go bail for her allies. The sum to be paid is to be fixed by our enemies unilaterally, and to admit of subsequent modification and increase. No limit is fixed, save the capacity of the German people for payment, determined

<sup>3</sup> *Current History*, July, 1919, pp. 17-19.

not by their standard of life, but solely by their capacity to meet the demands of their enemies by their labor. The German people would thus be condemned to perpetual slave labor.

In spite of the exorbitant demands, the reconstruction of our economic life is at the same time rendered impossible. We must surrender our merchant fleet. We are to renounce all foreign securities. We are to hand over to our enemies our property in all German enterprises abroad, even in the countries of our allies. Even after the conclusion of peace the enemy states are to have the right of confiscating all German property. No German trader in their countries will be protected from these war measures. We must completely renounce our colonies, and not even German missionaries shall have the right to follow their calling therein. We must thus renounce the realization of all our aims in the spheres of politics, economics, and ideas.

Even in internal affairs we are to give up the right to self-determination. The International Reparation Commission receives dictatorial powers over the whole life of our people in economic and cultural matters. Its authority extends far beyond that which the Empire, the German Federal Council, and the Reichstag combined ever possessed within the territory of the Empire. This commission has unlimited control over the economic life of the state, of communities, and of individuals. Further, the entire educational and sanitary system depends on it. It can keep the whole German people in mental thralldom. In order to increase the payments due, by the thrall, the commission can hamper measures for the social protection of the German worker.

In other spheres, also, Germany's sovereignty is abolished. Her chief waterways are subjected to international administration; she must construct in her territory such canals and such railways as her enemies wish; she must agree to treaties the contents of which are unknown to her, to be concluded by her enemies with the new states on the east, even when they concern her own functions. The German people is excluded from the League of Nations, to which is intrusted all work of common interest to the world.

Thus must a whole people sign the decree for its own proscription, nay, its own death sentence.

Germany knows that she must make sacrifices in order to attain peace. Germany knows that she has, by agreement, undertaken to make these sacrifices, and will go in this matter to the utmost limits of her capacity.

1. Germany offers to proceed with her own disarmament in advance of all other peoples, in order to show that she will help to usher in the new era of the peace of justice. She gives up universal compulsory service and reduces her army to 100,000 men, except as regards temporary measures. She even renounces the warships which her enemies are still willing to leave in her hands. She stipulates, however, that she shall be admitted forthwith as a state with equal rights into the League of Nations. . . . She stipulates that a genuine League of Nations shall come into being, embracing all peoples of good-will, even her enemies of to-day. The League must be inspired by a feeling of responsibility toward mankind and have at its disposal a power to enforce its will sufficiently strong and trusty to protect the frontiers of its members.

2. In territorial questions, Germany takes up her position unreservedly on the ground of the Wilson program. She renounces her sovereign right in Alsace-Lorraine, but wishes a free plebiscite to take place there. She gives up the greater part of the province of Posen, the district incontestably Polish in population, together with the capital. She is prepared to grant to Poland, under international guarantees, free and secure access to the sea by ceding free ports at Danzig, Königsberg and Memel, by an agreement regulating the navigation of the Vistula and by special railway conventions. Germany is prepared to insure the supply of coal for the economic needs of France, especially from the Sarre region, until such time as the French mines are once more in working order. The preponderantly Danish districts of Schleswig will be given up to Denmark on the basis of a plebiscite. Germany demands that the right of self-determination shall also be respected where the interests of the Germans in Austria and Bohemia are concerned.

She is ready to subject all her colonies to administration by the community of the League of Nations, if she is recognized as its mandatary.

3. Germany is prepared to make payments incumbent on her in accordance with the agreed program of peace up to a maximum sum of 100,000,000,000 gold marks, 20,000,000,000 by May 1, 1926, and the balance (80,000,000,000) in annual payments, without interest. These payments shall in principle be equal to a fixed percentage of the German Imperial and State revenues. The annual payment shall approximate to the former peace budget. For the first ten years the annual payments shall not exceed 1,000,000,000 gold marks a year. The German taxpayer shall not be less heavily burdened than the taxpayer of the most heavily burdened state among those represented on the Reparation Commission.

Germany presumes in this connection that she will not have to make any territorial sacrifices beyond those mentioned above, and that she will recover her freedom of economic movement at home and abroad.

4. Germany is prepared to devote her entire economic strength to the service of the reconstruction. She wishes to cooperate effectively in the reconstruction of the devastated regions of Belgium and Northern France. To make good the loss in production of the destroyed mines of Northern France, up to 20,000,000 tons of coal will be delivered annually for the first five years, and up to 80,000,000 tons for the next five years. Germany will facilitate further deliveries of coal to France, Belgium, Italy, and Luxemburg.

Germany is, moreover, prepared to make considerable deliveries of benzol, coal tar, and sulphate of ammonia, as well as dye-stuffs and medicines.

5. Finally, Germany offers to put her entire merchant tonnage into a pool of the world's shipping, to place at the disposal of her enemies a part of her freight space as part payment of reparation, and to build for them, in a series of years in German yards, an amount of tonnage exceeding their demands.

6. In order to replace the river boats destroyed in Belgium and Northern France, Germany offers river craft from her own resources.

7. Germany thinks that she sees an appropriate method for the prompt fulfillment of her obligation to make reparations conceding participation in coal mines to insure deliveries of coal.

8. Germany, in accordance with the desires of the workers of the whole world, wishes to insure to them free and equal rights. She wishes to insure to them in the treaty of peace the right to take their own decisive part in the settlement of social policy and social protection.

9. The German delegation again makes its demand for a neutral inquiry into the responsibility for the war and culpable acts in conduct. An impartial commission should have the right to investigate on its own responsibility the archives of all the belligerent countries and all the persons who took an important part in the war.

Nothing short of confidence that the question of guilt will be examined dispassionately can leave the peoples lately at war with each other in the proper frame of mind for the formation of the League of Nations.

These are only the most important among the proposals which we have to make. As regards other great sacrifices, and also as regards the details, the delegation refers to the accompanying memorandum and the annex thereto.<sup>4</sup>

The time allowed us for the preparation of this memorandum was so short that it was impossible to treat all the questions exhaustively. A fruitful and illuminating negotiation could only take place by means of oral discussion. This treaty of peace is to be the greatest achievement of its kind in all history. There is no precedent for the conduct of such comprehensive negotiations by an exchange of written notes only. The feeling of the peoples who have made such immense sacrifices makes them demand that their fate should be decided by an open, unreserved exchange of ideas on the principle: "Quite open covenants of peace openly arrived at, after which there shall be no private international understandings of any kind, but diplomacy shall proceed always frankly in the public view."

Germany is to put her signature to the treaty laid before her and to carry it out. Even in her need, justice for her is too sacred a thing to allow her to stoop to achieve conditions which she cannot undertake to carry out. Treaties of peace signed by the great Powers have, it is true, in the history of the last decades, again and again proclaimed the right of the stronger. But each of these treaties of peace has been a factor in originating and prolonging the world war. Whenever in this war the victor has spoken to the vanquished, at Brest-Litovsk and Bucharest, his words were but the seeds of future discord. The lofty aims which our adversaries first set before themselves in their conduct of the war, the new era of an assured peace of justice, demand a treaty instigated with a different spirit. Only the cooperation of all nations, a cooperation of hands and spirits, can build up a durable peace. We are under no delusions regarding the strength of the hatred and bitterness which this war has engendered, and yet the forces which are at work for a union of mankind are stronger now than ever they were before. The historic task of the Peace Conference of Versailles is to bring about this union.

Accept, Mr. President, the expression of my distinguished consideration.

BROCKDORFF-RANTZAU.

<sup>4</sup> Not printed herein.

*Letter transmitting the reply of the Allies to the German observations on the draft Treaty of Peace.*<sup>5</sup>

MR. PRESIDENT:

The Allied and Associated Powers have given the most earnest consideration to the observations of the German Delegation on the draft Treaty of Peace. The reply protests against the peace on the ground both that it conflicts with the terms upon which the armistice of November 11, 1918, was signed, and that it is a peace of violence and not of justice. The protest of the German delegation shows that they fail to understand the position in which Germany stands today. They seem to think that Germany has only to "make sacrifices in order to attain peace," as if this were but the end of some mere struggle for territory and power. The Allied and Associated Powers therefore feel it necessary to begin their reply by a clear statement of the judgment of the war which has been formed by practically the whole of civilized mankind.

In the view of the Allied and Associated Powers, the war which began on August 1, 1914, was the greatest crime against humanity and the freedom of peoples that any nation, calling itself civilized, has ever consciously committed. For many years the rulers of Germany, true to the Prussian tradition, strove for a position of dominance in Europe. They were not satisfied with that growing prosperity and influence to which Germany was entitled, and which all other nations were willing to accord her, in the society of free and equal peoples. They required that they should be able to dictate and tyrannize over a subservient Europe, as they dictated and tyrannized over a subservient Germany. In order to attain their ends they used every channel through which to educate their own subjects in the doctrine that might was right in international affairs. They never ceased to expand German armaments by land and sea, and to propagate the falsehood that it was necessary because Germany's neighbors were jealous of her prosperity and power. They sought to sow hostility and suspicion instead of friendship between nations. They developed a system of espionage and intrigue which enabled them to stir up internal rebellion and unrest, and even to make secret offensive preparations within the territory of their neighbors whereby they might, when the moment came, strike them down with greater certainty and ease. They kept Europe in a ferment by threats of violence, and when they found that their neighbors were resolved to resist their arrogant will, they determined to assist their predominance in Europe by force. As soon as their preparations were complete, they encouraged a subservient ally to declare war on Serbia at forty-eight hours' notice, a war involving the control of the Balkans, which they knew could not be localized and which was bound to unchain a general war. In order to make doubly sure, they refused every attempt at conciliation and conference until it was too late and the world war was inevitable for which they had plotted and for which alone among the nations they were adequately equipped and prepared.

Germany's responsibility, however, is not confined to having planned and started the war. She is no less responsible for the savage and inhuman manner in which it was conducted. Though Germany was itself the guarantor of Belgium, the

<sup>5</sup>London Times, June 17, 1919.

rulers of Germany violated, after a solemn promise to respect it, the neutrality of this unoffending people. Not content with this, they deliberately carried out a series of promiscuous shootings and burnings with the sole object of terrifying the inhabitants into submission by the very frightfulness of their action. They were the first to use poisonous gas, notwithstanding the appalling suffering it entailed. They began the bombing and long-distance shelling of towns for no military object, but solely for the purpose of reducing the *morale* of their opponents by striking at their women and children. They commenced the submarine campaign, with its piratical challenge to international law and its destruction of great numbers of innocent passengers and sailors in mid-ocean, far from succor, at the mercy of the winds and the waves, and the yet more ruthless submarine crews. They drove thousands of men and women and children with brutal savagery into slavery in foreign lands. They allowed barbarities to be practised against their prisoners of war from which the most uncivilized peoples would have recoiled. The conduct of Germany is almost unexampled in human history. The terrible responsibility which lies at her doors can be seen in the fact that not less than 7,000,000 dead lie buried in Europe, while more than 20,000,000 others carry upon them the evidence of wounds and suffering, because Germany saw fit to gratify her lust for tyranny by resort to war.

The Allied and Associated Powers believe that they will be false to those who have given their all to save the freedom of the world if they consent to treat this war on any other basis than as a crime against humanity and right.

This attitude of the Allied and Associated Powers was made perfectly clear to Germany during the war by their principal statesmen. It was defined by President Wilson in his speech of April 6, 1918, and explicitly and categorically accepted by the German people as a principle governing the peace:

"Let everything that we say, my fellow-countrymen, everything that we henceforth plan and accomplish, ring true to this response, till the majesty and might of our concerted power shall fill the thoughts and utterly defeat the force of those who flout and misprize what we honor and hold dear. Germany has once more said that force, and force alone, shall decide whether justice and peace shall reign in the affairs of men, whether Right as America conceives it or Dominion as she conceives it shall determine the destinies of mankind. There is, therefore, but one response possible from us: Force, Force to the utmost, Force without stint or limit, the righteous and triumphant Force which shall make Right the law of the world, and cast every selfish dominion down in the dust."

It was set forth clearly in a speech of the Prime Minister of Great Britain, dated December 14, 1917:

"There is no security in any land without certainty of punishment. There is no protection for life, property, or money in a state where the criminal is more powerful than the law. The law of nations is no exception, and, until it has been vindicated, the peace of the world will always be at the mercy of any nation whose professors have assiduously taught it to believe that no crime is wrong so long as it leads to the aggrandisement and enrichment of the country to which they owe allegiance. There have been many times in the history of the world criminal states. We are dealing with one of them now. And there will always be criminal states

until the reward of international crime becomes too precarious to make it profitable, and the punishment of international crime becomes too sure to make it attractive."

It was made clear also in an address of M. Clemenceau of September, 1918:

"What do they [the French soldiers] want? What do we ourselves want? To fight, to fight victoriously and unceasingly, until the hour when the enemy shall understand that no compromise is possible between such crime and 'justice.'"

Similarly, Signor Orlando, speaking on October 3, 1918, declared:

"We shall obtain peace when our enemies recognize that humanity has the right and duty to safeguard itself against a continuation of such causes as have brought about this terrible slaughter; and that the blood of millions of men calls not for vengeance, but for the realization of those high ideals for which it has been so generously shed. Nobody thinks of employing—even by way of legitimate retaliation—methods of brutal violence or of overbearing domination or of suffocation of the freedom of any people—methods and policies which made the whole world rise against the Central Powers. But, nobody will contend that the moral order can be restored simply because he who fails in his iniquitous endeavor declares that he has renounced his aim. Questions intimately affecting the peaceful life of nations, once raised, must obtain the solution which justice requires."

Justice, therefore, is the only possible basis for the settlement of the accounts of this terrible war. Justice is what the German delegation asks for, and says that Germany has been promised. But it must be justice for all. There must be justice for the dead and wounded and for those who have been orphaned and bereaved that Europe might be freed from Prussian despotism. There must be justice for the peoples who now stagger under war debts which exceed £30,000,000,000 that liberty might be saved. There must be justice for those millions whose homes and land, ships and property German savagery has spoliated and destroyed.

This is why the Allied and Associated Powers have insisted as a cardinal feature of the treaty that Germany must undertake to make reparation to the very uttermost of her power, for reparation for wrongs inflicted is of the essence of justice. That is why they insist that those individuals who are most clearly responsible for German aggression and for those acts of barbarism and inhumanity which have disgraced the German conduct of the war must be handed over to a justice which has not been meted out to them at home. That, too, is why Germany must submit for a few years to certain special disabilities and arrangements. Germany has ruined the industries, the mines, and the machinery of neighboring countries, not during battle, but with the deliberate and calculated purpose of enabling her own industries to seize their markets before their industries could recover from the devastation thus wantonly inflicted upon them. Germany has despoiled her neighbors of everything she could make use of or carry away. Germany has destroyed the shipping of all nations in

the high seas, where there was no chance of rescue for their passengers and crews. It is only justice that restitution should be made, and that these wronged peoples should be safeguarded for a time from the competition of a nation whose industries are intact and have even been fortified by machinery stolen from occupied territories. If these things are hardships for Germany, they are hardships which Germany has brought upon herself. Somebody must suffer for the consequences of the war. Is it to be Germany or the peoples she has wronged?

Not to do justice to all concerned would only leave the world open to fresh calamities. If the German people themselves, or any other nation, are to be deterred from following the footsteps of Prussia; if mankind is to be lifted out of the belief that war for selfish ends is legitimate to any state; if the old era is to be left behind and nations as well as individuals are to be brought beneath the reign of law, even if there is to be early reconciliation and appeasement; it will be because those responsible for concluding the war have had the courage to see that justice is not deflected for the sake of convenient peace.

It is said that the German revolution ought to make a difference and that the German people are not responsible for the policy of their rulers, whom they have thrown from power. The Allied and Associated Powers recognize and welcome the change. It represents a great hope for peace and a new European order in the future. But it cannot affect the settlement of the war itself. The German revolution was stayed until the German armies had been defeated in the field, and all hope of profiting by a war of conquest had vanished. Throughout the war, as before the war, the German people and their representatives supported the war, voted the credits, subscribed to the war loans, obeyed every order, however savage, of their Government. They shared the responsibility for the policy of their Government, for at any moment, had they willed it, they could have reversed it. Had that policy succeeded they would have acclaimed it with the same enthusiasm with which they welcomed the outbreak of the war. They cannot now pretend, having changed their rulers after the war was lost, that it is justice that they should escape the consequences of their deeds.

The Allied and Associated Powers therefore believe that the peace they have proposed is fundamentally a peace of justice. They are no less certain that it is a peace of right on the terms agreed. There can be no doubt as to the intentions of the Allied and Associated Powers to base the settlement of Europe on the principle of freeing oppressed peoples and redrawing national boundaries as far as possible in accordance with the will of the peoples concerned, while giving to each facilities for living an independent national and economic life. These intentions were made clear not only in President Wilson's address to Congress of January 8, 1918, but in "the principles of settlement enunciated in his subsequent addresses," which was the agreed basis of the peace. A memorandum on this point is attached to this letter.<sup>6</sup>

Accordingly the Allied and Associated Powers have provided for the reconstitution of Poland as an independent state with "free and secure access to the

<sup>6</sup> Not printed herein.



sea." All "territories inhabited by indubitably Polish populations" have been accorded to Poland. All territory inhabited by German majorities, save for a few isolated towns and for colonies established on land recently forcibly expropriated and situated in the midst of indubitably Polish territory, have been left to Germany. Wherever the will of the people is in doubt a plebiscite has been provided for. The town of Danzig has been constituted as a free city, so that the inhabitants are autonomous and do not come under Polish rule, and form no part of the Polish state. Poland has been given certain economic rights in Danzig, and the city itself has been severed from Germany because in no other way was it possible to provide for that "free and secure access to the sea" which Germany has promised to concede.

The German counter-proposals entirely conflict with the agreed basis of peace. They provide that great majorities of indisputably Polish population shall be kept under German rule. They deny secure access to the sea to a nation of over twenty million people, whose nationals are in the majority all the way to the coast, in order to maintain territorial connection between East and West Prussia, whose trade has always been mainly sea-borne. They cannot, therefore, be accepted by the Allied and Associated Powers. At the same time, in certain cases the German note has established a case for rectification which will be made, and in view of the contention that Upper Silesia, though inhabited by a two to one majority of Poles (1,250,000 to 650,000, 1910 German census), wishes to remain a part of Germany, they are willing that the question of whether or not Upper Silesia should form part of Germany or of Poland, should be determined by the vote of the inhabitants themselves.

In regard to the Saar Basin, the *régime* proposed by the Allied and Associated Powers is to continue for fifteen years. This arrangement they considered necessary both to the general scheme for reparation, and in order that France may have immediate and certain compensation for the wanton destruction of her northern coal-mines. The district has been transferred not to French sovereignty, but to the control of the Society of the League of Nations. This method has the double advantage that it involves no annexation, while it gives possession of the coal-field to France and maintains the economic unity of the district, so important to the interests of the inhabitants. At the end of fifteen years the mixed population, which in the meanwhile will have had control of its own local affairs under the governing supervision of the League of Nations, will have complete freedom to decide whether it wishes union with Germany, union with France, or the continuance of the *régime* provided for in the treaty.

As to the territories which it is proposed to transfer from Germany to Denmark and Belgium, some of these were robbed by Prussia by force, and in every case the transfer will only take place as the result of a decision of the inhabitants themselves, taken under conditions which will insure complete freedom to vote.

Finally, the Allied and Associated Powers are satisfied that the native inhabitants of the German colonies are strongly opposed to being again brought under Germany's sway; and the record of German rule, the traditions of the German Government, and the use to which these colonies were put as bases from which to prey upon the commerce of the world, make it impossible for

the Allied and Associated Powers to return them to Germany, or to entrust to her the responsibility for the training and education of their inhabitants.

For these reasons the Allied and Associated Powers are satisfied that their territorial proposals are both in accord with the agreed basis of peace and are necessary to the future peace of Europe. They are, therefore, not prepared to modify them except in the respects laid down.

Arising out of the territorial settlement are the proposals in regard to international control of rivers. It is clearly in accord with the agreed basis of the peace that inland states should have secure access to the sea along rivers which are navigable to their territory. They believe that the arrangements they propose are vital to the free life of the inland states. They do not think that they are any derogation of the rights of the other riparian states. If viewed according to the discredited doctrine that every state is engaged in a desperate struggle for ascendancy over its neighbors, no doubt such arrangements may be an impediment to the artificial strangling of a rival. But if it be the ideal that nations are to coöperate in the ways of commerce and peace, they are natural and right. The provision for the presence of representatives of important non-riparian states on the commissions is security that the commissions will consider the interests of all. A number of modifications, however, have been made in the original proposals.

Under the heading of economic and financial clauses the German delegation appear to have seriously misinterpreted the proposals of the Allied and Associated Powers. There is no intention on the part of the Allied and Associated Powers to strangle Germany or to prevent her from taking her proper place in international trade and commerce. Provided that she abides by the Treaty of Peace, and provided also that she abandons those aggressive and exclusive traditions which have been apparent in her business no less than her political methods, the Allied and Associated Powers intend that Germany shall have fair treatment in the purchase of raw materials and the sale of goods, subject to those temporary provisions already mentioned in the interests of the nations ravaged and artificially weakened by German action. It is their desire that the passions engendered by the war should die as soon as possible, and that all nations should share in the prosperity which comes from the honest supply of mutual needs. They wish that Germany shall enjoy this prosperity like the rest, though much of the fruit of it must necessarily go for many years to come in making reparation to her neighbors for the damage she has done. In order to make their intention clear, a number of modifications have been made in the financial and economic clauses of the treaty. But the principles upon which the treaty is drawn must stand.

The German delegation have greatly misinterpreted the reparation proposals of the treaty. These proposals confine the amounts payable by Germany to what is clearly justifiable under the terms of armistice in respect of damage caused to the civilian population of the Allies by the aggression of Germany. They do not provide for that interference in the internal life of Germany by the Reparation Commission which is alleged. They are designed to make the payment of that reparation which Germany must make as easy and convenient

to both parties as possible, and they will be interpreted in that sense. The Allied and Associated Powers, therefore, are not prepared to modify them.

But they recognize, with the German delegation, the advantage of arriving as soon as possible at the fixed and definite sum which shall be payable by Germany and accepted by the Allies. It is not possible to fix this sum today, for the extent of damage and the cost of repair have not yet been ascertained. They are, therefore, willing to accord to Germany all necessary and reasonable facilities to enable her to survey the devastated and damaged regions, and to make proposals thereafter within four months of the signing of the treaty for a settlement of the claims under each of the categories of damage for which she is liable. If within the following two months an agreement can be reached, the exact liability of Germany will have been ascertained. If agreement has not been reached by then, the arrangement as provided in the treaty will be executed.

The Allied and Associated Powers have given careful consideration to the request of the German delegation that Germany should be admitted to the League of Nations as one of the conditions of peace. They are unable to accede to this request. The German revolution was postponed to the last moments of the war, and there is as yet no guarantee that it represents a permanent change. In the present temper of international feeling, it is impossible to expect the free nations of the world to sit down immediately in equal association with those by whom they have been so grievously wronged. To attempt this too soon would delay and not hasten that process of appeasement which all desire. But the Allied and Associated Powers believe that if the German people prove by their acts that they intend to fulfil the conditions of the peace, and that they have abandoned forever those aggressive and estranging policies which caused the war, and have now become a people with whom it is possible to live in neighborly good fellowship, the memories of the past years will speedily fade, and it will be possible at an early date to complete the League of Nations by the admission of Germany thereto. It is their earnest hope that this may be the case. They believe that the prospects of the world depend upon the close and friendly coöperation of all nations in adjusting international questions and promoting the welfare and progress of mankind. But the early entry of Germany into the League must depend principally upon the action of the German people themselves.

In the course of its discussion of their economic terms and elsewhere, the German delegation has repeated its denunciation of the blockade instituted by the Allied and Associated Powers. Blockade is and always has been a legal and recognized method of war, and its operation has always been adopted to changes in international communications. If the Allied and Associated Powers have imposed upon Germany a blockade of exceptional severity, which throughout they have consistently sought to conform to the principles of international law, it is because of the criminal character of the war initiated by Germany and of the barbarous methods adopted by her in prosecuting it.

The Allied and Associated Powers have not attempted to make a specific answer to all the observations made in the German note. The fact of that omission does not indicate, however, that they are even either admitted or open to discussion.

In conclusion, the Allied and Associated Powers must make it clear that this letter and the memorandum attached constitute their last word. They have examined the German observations and counter-proposals with earnest attention and care. They have, in consequence, made practical concessions in the Draft Treaty. But in its principles they stand by it. They believe that it is not only a just settlement of the great war, but that it provides the basis upon which the peoples of Europe can live together in friendship and equality. At the same time it creates the machinery for the peaceful adjustment of all international problems by discussion and consent, and whereby the settlement of 1919 itself can be modified from time to time to suit new facts and new conditions as they arise. It is frankly not based upon a general condonation of the events of 1914-1918. It would not be a peace of justice if it were. But it represents a sincere and deliberate attempt to establish "that reign of law, based upon the consent of the governed, and sustained by the organized opinion of mankind," which was the agreed basis of the peace.

As such, the treaty in its present form must be accepted or rejected. The Allied and Associated Powers therefore require a declaration from the German delegation within five days that they are prepared to sign the treaty as now amended. If they declare within the period that they are prepared to sign the treaty as it stands, arrangements will be made for the immediate signature of the peace at Versailles. In default of such a declaration this communication constitutes the notification provided for in Article II of the Convention of February 16, 1919, prolonging the Armistice signed on November 11, 1918, and again prolonged by the Agreement of December 13, 1918, and January 16, 1919, the said Armistice will then terminate and the Allied and Associated Powers will take such steps as they think needful to enforce their terms.

The more important modifications in the draft treaty which the Allies agreed to make were as follows:

A plebiscite for Upper Silesia, with guarantees of coal from that region.

Frontier rectifications in West Prussia.

The omission of the third zone from the Schleswig plebiscite.

A temporary increase of the permitted strength of the German army from 100,000 to 200,000.

A declaration of intention to submit within a month of the treaty's signature a list of those accused of violation of the laws and customs of war.

An offer to coöperate with a German Commission on Reparations and to receive suggestions for discharging the obligation.

Certain detailed modifications in the financial, economic, and ports and waterways clauses, including the abolition of the proposed Kiel Canal Commission.

Assurance to Germany of membership in the League of Nations in the early future if she fulfils her obligations.<sup>7</sup>

According to the last paragraph of the Allied reply of June 16th, the treaty as modified was required to be accepted or rejected within five days. This period was later extended by two days, making the ultimatum expire on June 23d. Should the treaty not be accepted within that period, the armistice was to terminate and the Allied and Associated Powers would "take such steps as they think needful to enforce their terms."

The delivery of the ultimatum of the Allies produced a Cabinet crisis in Germany and a change in the Government. The original German Peace delegation left Versailles with the final terms of the Allies. In a note dated June 21, the day before the expiration of the time limit, and delivered on June 22d by a subordinate peace delegate, the German Government offered to sign the treaty with reservations. These reservations declined responsibility for any resistance by the inhabitants of districts separated from Germany by the treaty, or for the failure to carry out the economic and financial conditions, which Germany regarded as incapable of fulfilment. Germany declined to accept Articles 227-230 of the treaty under which she was required to admit responsibility for the war, to give up for trial German subjects accused of breaches of international law and acts contrary to the customs of war, and a protest was lodged against taking away the German colonial possessions. The note proposed a declaration, to be made an integral part of the treaty, whereby within two years it was to be submitted to the Council of the League of Nations, before which German delegates would have the same rights and privileges as the representatives of the other contracting parties, for decision as to whether the conditions of the treaty impair the right of self-determination of the German people and also whether they impair the free economic development of Germany on the basis of equality.

A reply was delivered immediately by the Allies peremptorily stating that the time for discussion had passed, that they could accept or acknowledge no qualification or reservation, and must require of the German representatives an unequivocal decision as to their purpose to sign and accept as a whole, or not to sign and accept, the treaty as finally formulated. M. Clemenceau also stated that "after the signature the Allies and Associated Powers must hold Germany

<sup>7</sup> The New York Times, June 17, 1919.

responsible for the execution of every stipulation of the treaty." This reply brought forth a further request from Germany for an extension of time for forty-eight hours in order to enable the new Cabinet to come into contact with the National Assembly. This request was likewise promptly rejected, and on June 23d the German Government, "yielding to superior force and without renouncing in the meantime its own view of the unheard of injustice of the peace conditions . . . declares that it is ready to accept and sign the peace conditions imposed."

This declaration was followed by several days of uncertainty in the selection of German plenipotentiaries to sign the treaty. Finally on June 27th, Dr. Hermann Müller, the Foreign Minister in the new German Government, and Dr. Johannes Bell, Minister of Colonies, arrived at Versailles, empowered to sign the treaty. The ceremony of signing took place the following day, June 28th, in the Hall of Mirrors in the Palace at Versailles, exactly five years to the day after the assassination of the Austrian Crown Prince at Serajevo, commonly regarded as the opening event in the Great War.

The full English text of the treaty as signed is printed in the SUPPLEMENT to this JOURNAL.

The Treaty of Peace with Germany was presented to the United States Senate by President Wilson on July 10, 1919, for its advice and consent to ratification in accordance with the provisions of the Constitution of the United States. Departing from its custom of considering treaties in executive session, the Senate convened in public session for the purpose of receiving the treaty and listening to the presentation remarks of the President.

The tasks which the circumstances of the war had created for settlement by the Peace Conference were summarized by President Wilson as follows:<sup>8</sup>

Two great empires had been forced into political bankruptcy, and we were the receivers. Our task was not only to make peace with the Central Empires and remedy the wrongs their armies had done.

The Central Empires had lived in open violation of many of the very rights for which the war had been fought, dominating alien peoples over whom they had no natural right to rule, enforcing, not obedience, but veritable bondage, exploiting those who were weak for the benefit of those who were masters and overlords only by force of arms. There could be no peace until the whole order of central Europe was set right.

<sup>8</sup> Senate Document No. 50, 66th Cong. 1st sess.

That meant that new nations were to be created—Poland, Czechoslovakia, Hungary itself. No part of ancient Poland had ever in any true sense become a part of Germany, or of Austria, or of Russia. Bohemia was alien in every thought and hope to the monarchy of which she had so long been an artificial part; and the uneasy partnership between Austria and Hungary had been one rather of interest than of kinship or sympathy. The Slavs whom Austria had chosen to force into her empire on the south were kept to their obedience by nothing but fear. Their hearts were with their kinsmen in the Balkans. These were all arrangements of power, not arrangements of natural union or association. It was the imperative task of those who would make peace and make it intelligently to establish a new order which would rest upon the free choice of peoples rather than upon the arbitrary authority of Hapsburgs or Hohenzollerns.

More than that, great populations bound by sympathy and actual kin to Rumania were also linked against their will to the conglomerate Austro-Hungarian monarchy or to other alien sovereignties, and it was part of the task of peace to make a new Rumania as well as a new Slavic state clustering about Serbia.

And no natural frontiers could be found to these new fields of adjustment and redemption. It was necessary to look constantly forward to other related tasks. The German colonies were to be disposed of. They had not been governed; they had been exploited merely, without thought of the interest or even the ordinary human rights of their inhabitants.

The Turkish Empire, moreover, had fallen apart, as the Austro-Hungarian had. It had never had any real unity. It had been held together only by pitiless, inhuman force. Its peoples cried aloud for release, for succor from unspeakable distress, for all that the new day of hope seemed at last to bring within its dawn. Peoples hitherto in utter darkness were to be led out into the same light and given at last a helping hand. Undeveloped peoples and peoples ready for recognition, but not yet ready to assume the full responsibilities of statehood, were to be given adequate guarantees of friendly protection, guidance and assistance.

And out of the execution of these great enterprises of liberty sprang opportunities to attempt what statesmen had never found the way before to do; an opportunity to throw safeguards about the rights of racial, national and religious minorities by solemn international covenant; an opportunity to limit and regulate military establishments where they were most likely to be mischievous; an opportunity to effect a complete and systematic internationalization of waterways and railways which were necessary to the free economic life of more than one nation and to clear many of the normal channels of commerce of unfair obstructions of law or of privilege; and the very welcome opportunity to secure for labor the concerted protection of definite international pledges of principle and practice.

The principles upon which such a stupendous settlement was to be made, the President stated, had been formulated by the United

States—"the principles upon which the armistice had been agreed to and the parleys of peace undertaken—and no one doubted that our desire was to see the Treaty of Peace formulated along the actual lines of those principles," which "were readily acceded to as the principles to which honorable and enlightened minds everywhere had been bred. They spoke the conscience of the world as well as the conscience of America."<sup>9</sup>

But the President, after stating that "the problems with which the Peace Conference had to deal and the difficulty of laying down straight lines of settlement anywhere on a field on which the old lines of international relationship, and the new alike, followed so intricate a pattern and were for the most part cut so deep by historical circumstances which dominated action even where it would have been best to ignore or reverse them," proceeded:

Old entanglements of every kind stood in the way—promises which governments had made to one another in the days when might and right were confused and the power of the victor was without restraint. Engagements which contemplated any dispositions of territory, any extensions of sovereignty that might seem to be to the interest of those who had the power to insist upon them, had been entered into without thought of what the peoples concerned might wish or profit by; and these could not always be honorably brushed aside. It was not easy to graft the new order of ideas on the old, and some of the fruits of the grafting may, I fear, for a time be bitter.

As the result of this cross current of politics and of interest, the President admitted that "the treaty . . . is not exactly what we would have written. It is probably not what any one of the national delegations would have written. But results have worked out which on the whole bear test. I think that it will be found that the compromises which were accepted as inevitable nowhere cut to the heart of any principle. The work of the Conference squares, as a whole, with the principles agreed upon as the basis of the peace as well as with the practical possibilities of the international situations which had to be faced and dealt with as facts."

Speaking of the terms of the treaty in so far as they affect the United States, the President stated that "in the settlements of the peace we have sought no special reparation for ourselves, but only the restoration of right and the assurance of liberty everywhere that

<sup>9</sup> President Wilson's fourteen points, to which he had reference, are printed in this JOURNAL for April, 1919, p. 161.



the effects of the settlement were to be felt. We entered the war as the disinterested champions of right and we interested ourselves in the terms of peace in no other capacity."

The treaty was promptly referred to the Committee on Foreign Relations, where it is now under consideration.

GEO. A. FINCH.

#### INCURSIONS INTO MEXICO AND THE DOCTRINE OF HOT PURSUIT

The pursuit in June of this year of Villa and his semi-political "bandits" across the Mexican border from United States territory by American troops has revived memories of Villa's attack on Columbus, New Mexico, on March 9, 1916, and the inglorious check of our expeditionary forces into Mexico at Carrizal on June 21st of that year.

It appears that in consequence of some shots fired into El Paso by Villistas in the course of an engagement with Carranzistas at El Juarez on June 16, 1919, American forces over 3,000 strong crossed to the Mexican side on the same night and returned to El Paso on June 17th with a number of cavalry horses and prisoners, after having driven the Villistas out of El Juarez to the desert beyond.

Although General Caball had told General Gonzales that "there was no idea of invading Mexican sovereignty" and that our forces would withdraw as soon as possible (which was actually done), General Aguillar, Carranza's son-in-law, and "Confidential Ambassador to the United States," protested, albeit mildly, against this "violation of Mexican sovereignty" and insisted that the Mexican Government had not asked for aid of this sort from the United States. In reply, our State Department is stated to have made strong representations that Americans must be protected, and General Aguillar declared that the Mexican Government was satisfied and that the incident was closed.

In itself this affair is of slight importance, but since a renewal of such instances may be expected in the future, it will be profitable to recall similar incursions and expeditions in our previous history, and examine the principles of international law by which they have been justified or advocated.

In the first place, it should be noted that the expedition into the heart of Mexico which came to such a humiliating end in June, 1916,<sup>1</sup>

<sup>1</sup> For discussions of this incident, see editorials in this JOURNAL, Vol. X, pp. 337 ff, and Vol. XI, pp. 399 ff.

was of a very different sort than the recent incursion, and was inspired by a much more serious cause. It will be recalled that the object of that ill-fated expedition was the capture of Villa, that it had been deliberately planned in consequence of an actual invasion of the United States by Villista forces, and that there was an attack on an American city, in the course of which a number of Americans were killed and American property was destroyed. It was not an instance of "hot pursuit" or what has sometimes been called the "hot trail."

The pursuit of predatory Indians and other marauders into Mexican territory is an old and oft-repeated story. As early as April 21, 1836, in a memorandum to Mr. Gorostiza, the Mexican Minister, Secretary of State Forsyth, referring to the contest in Texas and much feared Indian hostilities, as also to the intention to send General Gaines to the frontier in order to protect United States territory, said: "Should the troops, in the performance of their duty, be advanced beyond the point Mexico might suppose was within the territory of the United States, the occupation of the position was not to be taken as an indication of any hostile feeling, or of a desire to establish a possession or claim not justified by the treaty of limits," but only as "precautionary and provisional," to be "abandoned whenever . . . the disturbances in that region should cease, they being the only motive for it."

In his reply of April 23d, Mr. Gorostiza maintained that the taking by General Gaines of any position "beyond the known limits of the United States" would "not only affect the rights of Mexico as an independent nation, but also injure its interests," and that the holding of "the position taken, even though it be included within the assigned limits of Mexico, until the disturbances in Texas should cease, would be equal to a real military occupation of a part of the territory of Mexico, and to indirect intervention in its domestic affairs."

On April 26th, Mr. Forsyth stated that his notice "was not intended to express the intention to occupy a post within the acknowledged, known limits of Mexico, but to apprise Mexico that if General Gaines should occupy a position supposed by each Government to be within its limits, that occupation would not be used either as the foundation of a claim or to strengthen a claim—the sole purpose being to enable this Government to do its duty to itself and to Mexico."

Mr. Gorostiza, on April 23th, diplomatically "expressed satisfaction that Mr. Forsyth's opinion, as he understood it, coincided with

his own 'on this capital point, . . . that General Gaines's troops will not take a position on any ground known to be beyond the limits of the United States; and as a natural consequence . . . that such position can in no case be on ground previously possessed by Mexico, and, of course, within its known limits.' "

On May 3d, Mr. Forsyth replied: "Except in case of necessity, General Gaines will not occupy ground not indisputably within the limits of the United States. In case of necessity, whether the possession of the ground he may occupy is now or has heretofore been claimed by Mexico cannot be made a question by that officer; he will take it to perform his duties to the United States, and to fulfil the obligations of the United States to Mexico. The just and friendly purpose for which he does occupy it (if he should do so), being beforehand explained to Mexico, it is expected will prevent either belief or suspicion of any hostile or equivocal design on his part. It is not intended to be the assertion of a right of property or possession."

On May 9th, however, Mr. Gorostiza protested against the order authorizing General Gaines, in case of necessity, to advance his troops to Nacogdoches, which his instructions declared to be within the limits claimed by the United States, but which the Mexican Government regarded as involving a possible violation of Mexican territory.

In a later communication, dated December 10, 1836, to Mr. Ellis, our Minister to Mexico, Mr. Forsyth stated his view of the principle of international law bearing on this subject, as follows:

You will find no difficulty in showing to the Mexican Government that it rests upon principles of the law of nations, entirely distinct from those on which war is justified—upon the immutable principles of self-defence—upon the principles which justify decisive measures of precaution to prevent irreparable evil to our own or to a neighboring people.

The grossness of the error of placing it on the right of war, as also the folly of relying upon that mode of redress, you can render obvious, by supposing that hostilities were, under present circumstances on the frontier, about to begin. Our fellow-citizens, of all ages and classes, are to be exposed to massacre, their property to destruction, and the whole frontier to be laid waste by those savages Mexico was bound to control. Until these evils happen, on Mr. Gorostiza's theory, we have no right to take a position which will enable us to act with effect; and before we do act, according to our promises under Article XXXIII of the treaty, after the frontier has been desolated, we must demand redress of Mexico, wait for it to be refused, and then make war upon Mexico. We are quietly to suffer injuries we might prevent in the expectation of redress—redress from irreparable injuries from Mexico, who did not inflict them, but who was, from circumstances,

without the power to prevent, as she would be after they were inflicted, without the power to redress them. To make war upon Mexico for this involuntary failure to comply with her obligations, would be equivalent to an attempt to convert her misfortunes into crimes—her inability into guilt.

A company of Mexican rangers having pursued into Mexico a band of Indians who had made an incursion into Texas, Mr. March, Secretary of State, on February 4, 1856, wrote to Mr. Almonte, Mexican Minister, saying: "If Mexican Indians whom Mexico is bound to restrain are permitted to cross its border and commit depredations in the United States, they may be chased across the border and then punished." He also said: "If Indians whom the United States are bound to restrain shall, under the same circumstances, make a hostile incursion into Mexico, this Government will not complain if the Mexican forces who may be sent to repel them shall cross to this side of the line for that purpose, provided that in so doing they abstain from injuring the persons and property of citizens of the United States."

On January 22, 1874, Secretary of State Fish also gave it as his opinion that an incursion into the territory of Mexico for the purpose of dispersing a band of Indian marauders is, if necessary, not a violation of the law of nations.

After repeated raids by Mexicans and Indians into Texas, in a communication to General Sherman, dated June 1, 1877, Mr. McCrary, Secretary of War, gave the following instructions:

The President desires that the utmost vigilance on the part of the military forces in Texas be exercised for the suppression of these raids. It is very desirable that efforts to this end, in so far at least as they necessarily involve operations on both sides of the border, be made with the coöperation of the Mexican authorities; and you will instruct General Ord, commanding in Texas, to invite such coöperation on the part of the local Mexican authorities, and to inform them that while the President is anxious to avoid giving offense to Mexico, he is nevertheless convinced that the invasion of our territory by armed and organized bodies of thieves and robbers to prey upon our citizens should not be longer endured.

General Ord will at once notify the Mexican authorities along the Texas border, of the great desire of the President to unite with them in efforts to suppress this long-continued lawlessness. At the same time he will inform those authorities that if the Government of Mexico shall continue to neglect the duty of suppressing these outrages, that duty will devolve upon this Government, and will be performed, even if its performance should render necessary the occasional crossing of the border by our troops. You will, therefore, direct General Ord that

in case the lawless incursions continue he will be at liberty, in the use of his own discretion, when in pursuit of a band of the marauders, and when his troops are either in sight of them or upon a fresh trail, to follow them across the Rio Grande, and to overtake and punish them, as well as retake stolen property taken from our citizens and found in their hands on the Mexican side of the line.

Apparently these instructions were not wholly effective, for on August 13, 1878, Mr. Evarts, then Secretary of State, wrote to Mr. Foster, our Minister to Mexico, as follows:

The first duty of a government is to protect life and property. This is a paramount obligation. For this governments are instituted, and governments neglecting or failing to perform it become worse than useless. This duty the Government of the United States has determined to perform to the extent of its power toward its citizens on the border. It is not solicitous, it never has been, about the methods or ways in which that protection shall be accomplished, whether by formal treaty stipulation or by informal convention; whether by the action of judicial tribunals or that of military forces. Protection *in fact* to American lives and property is the sole point upon which the United States are tenacious. In securing it they have a right to ask the co-operation of their sister Republic. So far, the authorities of Mexico, military and civil, in the vicinity of the border appear not only to take no steps to effectively check the raids or punish the raiders, but demur and object to steps taken by the United States. . . .

I am not unmindful of the fact that, as you have repeatedly reported, there is reason to believe that the Mexican Government really desires to check these disorders. According to the views you have presented, its statesmen are believed to be sagacious and patriotic, and well disposed to comply with all international obligations. But, as you represent, they encounter, or apprehend that they may encounter, a hostile public feeling adverse to the United States, especially in these border localities, thwarting their best intentions and efforts. It is greatly to be regretted that such a state of perverted public feeling should exist. But its existence does not exonerate the Mexican Government from any obligation under international law. Still less does it relieve this Government from its duties to guard the welfare of the American people. The United States Government cannot allow marauding bands to establish themselves upon its borders with liberty to invade and plunder United States territory with impunity, and then, when pursued, to take refuge across the Rio Grande under protection of the plea of the integrity of the soil of the Mexican Republic.

An agreement with Mexico was finally reached July 29, 1882, which provided for the crossing of the frontier by the armed forces of either country in pursuit of hostile Indians.<sup>2</sup>

<sup>2</sup> See I Malloy, pp. 1144-45. For other agreements with Mexico relating to this subject, see *Ibid.*, 1157, 1158, 1162, 1170, 1171 and 1177.

For the correspondence pertaining to these matters, see II Moore's Digest, pp. 418 ff.; I Wharton's Digest, pp. 229 ff. For further information as to Indian raids into Mexico and Canada, see II Moore, pp. 434 ff.

The right to cross the border in order to prevent the violation of territorial sovereignty was also maintained by Great Britain, and admitted by the United States Government, in the case of the *Caroline*, an American steamboat which was being used by Canadian insurgents and their American sympathizers to transport recruits and military supplies from Schlosser, N. Y., on the American side of the Niagara River, to Navy Island, the headquarters of the insurgents, during the Canadian insurrection in the winter of 1837-8. This island, through which ran the boundary line of the United States and Canada, was located in the middle of the Niagara River. It was believed that the *Caroline* would be used also to transport the expedition from Navy Island to the Canadian shore. On the night of December 29, 1837, she was seized by Canadian forces at Schlosser, N. Y., and set adrift over the Niagara Falls.

Daniel Webster, then Secretary of State, contended, however, that to justify the conduct of the Canadian authorities, England must show a "necessity of self-defense, instant, overwhelming, and leaving no choice of means and no moment for deliberations. . . ." As Westlake says: "This was good law, except as to the emergency's leaving no moment for deliberation, which seems to imply, but which was not intended to imply, that the act was one which deliberation would condemn."<sup>3</sup>

The doctrine of "hot pursuit," when applied on the high seas, based on the right of protection and self-defense, in case of necessity, has found considerable support from authorities on international law.

For example, Bluntschli says:

When the crew of a vessel has committed an offense on land or in territorial waters of another state, and is pursued by the justice of such a state, the pursuit of this vessel may be continued outside the territorial waters into the free sea.

But when the vessel has escaped this pursuit, it cannot be attacked on the high sea by the vessels of another state.<sup>4</sup>

<sup>3</sup> International Law, Pt. I, 2d ed., p. 313. For the case of the *Caroline*, see especially II Moore's Digest, § 217, pp. 409 ff. See also III Moore's International Arbitrations, 2419 ff.; General Scott, Autobiography, I, pp. 305-317; Hall, 7th ed., pp. 323-4; Hershey, Essentials, p. 145 n.; Lawrence, 5th ed., Principles, § 229, p. 610; Snow, Cases, pp. 177-8; and I Westlake, pp. 313-14.

<sup>4</sup> *Le droit international codifié*, 3d ed., Art. 342.

Rivier declares:

The territorial jurisdiction in coastal waters is susceptible of extension to the high seas by virtue of a right of pursuit practiced for a long time by Great Britain and the United States which may be considered as accepted by consent of nations. When a vessel or its crew, having committed an infraction in territorial waters, seeks to evade punishment by taking to the open sea, the vessels of the [injured] state may pursue it into the high seas and bring it back by force.<sup>5</sup>

Hall (7th ed., p. 258) includes among exceptions to the rule of territorial jurisdiction the case where "persons on board a ship lying in or passing through foreign waters commit acts forbidden by the territorial law"; in which case, he says, "the local authorities may pursue the offending vessel into the open sea in order to vindicate their jurisdiction."

Again, says Hall (p. 266):

It has been mentioned that when a vessel, or some one on board her, while within foreign territory commits an infraction of its laws, she may be pursued into the open seas, and there arrested. It must be added that this can only be done when the pursuit is commenced while the vessel is still within the territorial waters or has only just escaped from them. The reason for the permission seems to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun, or which but for the accident of immediate escape would have been begun, within the territory itself, and that it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised. The restriction of the permission within the bounds stated may readily be explained by the abuses which would spring from a right to waylay and bring in ships at a subsequent time, when the identity of the vessel or of the persons on board might be doubtful.

Westlake (I, 2d ed., p. 177) speaks of the "perhaps doubtful exception" to the "exclusive authority of the state of the flag in the open sea" for the "case of pursuit lawfully commenced in territorial waters and continued without interruption in the open sea." But he cites in support of this exception the fact that "this extension of the right of the territorial state was voted unanimously by the Institute of International Law in 1894," and remarks that the right of pursuit is "necessary to the effective administration of justice and to the secure enjoyment of fishery rights in times of peace." He also cites with apparent approval Sir Charles Russell's argument

<sup>5</sup> *Principles*, I, p. 151.

before the Behring Sea arbitrators that "there is a general consent on the part of nations to the action of a state pursuing a vessel under such circumstances [an offense against municipal law committed within territorial waters], cut of its territorial waters and on to the high sea." He takes issue with the eminent advocate's statement that "it is not a strict right by international law, but something which nations will stand by and see done, and not interpose if they think that the particular person has been endeavoring to commit a fraud against the laws of a friendly Power. . . ." He adds: "In our sense of that word there can be no such thing as international law, if it does not exist in a case in which a general consent to it on the part of nations is admitted."

Woolsey (6th ed., § 58, p. 71) remarks:

For a crime committed in port a vessel may be chased into the high seas and there arrested, without a suspicion that territorial rights have been violated, while to chase a criminal across the borders and seize him on foreign soil is a gross offense against sovereignty.

Under the heading "So-Called Right of Pursuit," Oppenheim (Vol. I, 2d ed., p. 336) says:

It is a universally recognised customary rule that men-of-war of a littoral state can pursue into the open sea, seize and bring back into a port for trial any foreign merchantman that has violated the law whilst in the territorial waters of the state in question. But such pursuit into the open sea is permissible only if commenced while the merchantman is still in the said territorial waters or has only just escaped thence, and the pursuit must stop as soon as the merchantman passes into the maritime belt of a foreign state.

The Institute of International Law unanimously adopted the following among its resolutions of 1894:

The littoral state has the right to continue on the high seas a pursuit commenced in the territorial sea, and to arrest and judge the ship which has broken its laws within its waters. In case, however, of capture on the high sea, the fact shall be notified without delay to the state of which the ship carries the flag. The pursuit must be interrupted as soon as the ship enters the territorial sea of its own country or of a third Power. The right to pursue is at an end as soon as the ship has entered a part of its own country or a third Power.<sup>6</sup>

The publicist who seems to deal most fully with this subject is

<sup>6</sup> See Art. 8, p. 33, 13 *Annuaire*.



Piggott.<sup>7</sup> Owing to this fact we take the liberty of quoting from him *in extenso*:

Stated broadly, the principle is that when an offence has been committed within the jurisdiction, by a foreign as well as a British ship, and she gets away to sea, she may be pursued on the high sea, captured, and brought in to be dealt with according to law. We have here a direct exercise of force—usually by the Executive independent of any legislative warrant, though the principle may be embodied in legislation—upon the high sea. The condition is that the pursuit should be started immediately, that it should be “hot pursuit”; but this condition being satisfied, there appears to be no limit of space or time during which it may continue. The pursuit may be continued the high seas over, but presumably stopping when the escaping vessel enters the area over which a foreign nation exercises its legislative jurisdiction.

But why is this “hot pursuit” justified? Why does it not violate the freedom of the sea? The answer must be found in the nature of the offence. And for this reason: it is certain that the law, confined as it is to a purely territorial operation, may in ordinary cases be evaded by escape to a foreign country. It is certain, too, that if an offender, though taken red-handed, escape on board a foreign ship, he cannot be pursued beyond low-water mark, however hotly: the remedy, as indicated above, then lies in extradition. But the case can hardly be the same where the ship participates actively in the rescue. The difference then, if hot pursuit of ships is justified, must lie in the nature of the offence committed.

The two familiar examples of the application of the principle are offences against the revenue laws, or against the fishery laws, committed within the revenue or the fishery waters respectively. In these cases there is authority both in practice and judicial opinion, that hot pursuit outside those areas on to the high sea would be justified, and the seizure upheld as consistent with the law of nations. (Story, J., *the Maricanna Flora*.) . . .

From the nature of the offences the ship would be used by the master for the commission of the offence, and pursuit and seizure are probably justified where the penalty is confiscation of the ship. For this an analogy is to be found (though, indeed, it may be no more than fanciful), in the case of hot pursuit of wild animals. The temporary property which is recognized in wild animals which have been confined is maintained during escape, if they are immediately pursued beyond the preserve. And it may be that where an offence has been committed for which the penalty is confiscation, the law regards the property of the State in the ship as having been so far created, that it may be preserved by immediate pursuit beyond the jurisdiction.

\* \* \* \* \*

The principle of hot pursuit applies as well to breaches of the law in force in the territorial waters as to offences committed in harbour or in the waters of the dominion. It has in fact a very special application to the territorial

<sup>7</sup> Nationality, Vol. II, p. 35-40.

waters, for it fills one of the gaps left in the protection of the national rights by the fact that these waters are not part of the realm. Breaches of revenue and fishery laws are more often than not committed in shore by small boats, the ship herself lying off in the territorial waters. In such a case, the seizure of the ship would undoubtedly be justified on the ground that the boats are the dependencies of ship, and that therefore she is herself constructively guilty of having committed the offence.

The territorial waters have been specially referred to, as the question has a practical bearing on what may be called the legal status of these waters. But the rule here suggested is obviously not limited to them; the ship's boats may themselves be operating in territorial waters, and the ship lying some miles out to sea.

There seems, however, to be one manifest condition attached to such a seizure: that there should be some overt act of the ship in relation to the offence, showing her participation in it: thus, that she was superintending the operations of her boats, and was, in fact, their base or *point d'appui*.

Active participation in the offence is probably the essential to seizure, and not the mere fact that the boats belong to the ship. Suppose, for example, boats belonging to a vessel had been seized for sealing in Dominion waters, the ship herself being at the time twenty miles away fishing on her own account. The seizure of the ship by a cruiser, in consequence of information by telegraphy that her boats had been captured, could scarcely be justified. This brings us back to the simple case with which we started. The case is in fact a corollary of what has gone before. Certain conditions being fulfilled in regard to her relation to her boats, a vessel not actually in the waters is regarded as constructively within those limits: then the law as to seizure of vessels for offences committed within those limits must apply: that is to say, she may be seized at once, or she may be pursued on to the high sea.

We also have the high authority of Justice Story, voicing what appears to have been the unanimous opinion of the Supreme Court in the case of the *Marianna Flora* (1826, 11 Wheaton, p. 1), to the effect that "American ships, offending against our own laws, may be seized upon the ocean, and foreign ships, thus offending within our territorial jurisdiction may be pursued and seized upon the ocean, and brought into our ports for adjudication"; and "where an aggression was committed by a foreign armed merchant vessel, on a public armed ship of the United States, under these circumstances, and a combat ensued, upon mutual misapprehension and mistake, the commander of the public ship was held exempt from costs and damages, for subduing, seizing and bringing into a port of this country for adjudication, the offending vessel."<sup>8</sup>

<sup>8</sup> These citations are from the head-notes to this case.

But there are a number of authorities who disapprove of the doctrine of "hot pursuit" on the high seas.

Thus, in a note to Wheaton on "Municipal Seizures Beyond the Marine League" (8th ed., No. 108, p. 260) Dana concludes: "It may be said that the principle is settled, that municipal seizures cannot be made, for any purpose, beyond territorial waters."

Field also lays it down as a rule of international law that "an inmate of a foreign ship who commits an infraction of the criminal law of a nation within its territory cannot be pursued beyond its territory into any port of the high seas."<sup>9</sup>

In the discussion of the Hovering Acts, Phillimore remarks:

Nevertheless, it cannot be maintained as a sound proposition of international law that a seizure for purposes of enforcing municipal law can be lawfully made beyond the limits of the territorial waters, though in these *hovering* cases judgments have been given in favour of seizures made within a limit fixed by municipal law, but exceeding that which has been agreed upon by international law. Such a judgment, however, could not have been sustained if the foreign state whose subject's property had been seized had thought proper to interfere. Unless, indeed, perhaps, in a particular case, where a state had put in force, or at least enacted, a municipal law of its own, like that of the foreign state under which its subject's property had been seized. It is at least quite intelligible why such a state would not interfere on behalf of its subject. My observation does not deny to the neutral, in time of war, the right to complain of and possibly to prevent the *hovering* of belligerent ships so near her coasts and ports as manifestly to menace and alarm vessels homeward or outward bound. . . .<sup>10</sup>

And similarly Twiss strongly disapproves of the exercise for any reason whatever of national maritime jurisdiction beyond the marine league.<sup>11</sup>

This negative view appears also at first sight to be supported by the great judicial authority of Chief Justice Marshall. In *Rose v. Himely* (1808, 4 Cranch, 241) C. J. Marshall, supported by the majority of his associates of the Supreme Court, held that "a seizure beyond the limits of the territorial jurisdiction for breach of municipal regulations, is not warranted by the law of nations." It has been claimed (Taylor, § 248) that *Rose v. Himely* was overruled by *Hudson v. Guestier* (1810, 6 Cranch, 281). This was the opinion of Chief Justice Marshall himself, but the report of the latter case leaves this

<sup>9</sup> International Code, 2d ed., art. 626, pp. 426-7.

<sup>10</sup> Commentaries, 3d ed., Vol. I, p. 276.

<sup>11</sup> Law of Nations . . . in Time of Peace, § 190.

point doubtful.<sup>12</sup> *Rose v. Himely* is certainly in conflict with certain views previously expressed by Marshall in *Church v. Hubbard* (1804, 2 Cranch, 187, and *Scott's Cases*, 343). But the real purport of the latter decision was that "the court did not undertake to pronounce judicially, in a suit on a private contract (a policy of insurance) that a seizure of an American vessel made at four leagues, by a foreign power, was void."

There is at least one famous case in which, it was claimed, the pursuit was continued and capture made in territorial waters.

In 1891, the *Itata*, an armed transport in the service of Chilean insurgents, was accused of violating the neutrality laws of the United States. According to one version, she was pursued by American naval forces from San Diego, California, to Iquique, Chile, where she was surrendered to Admiral McCann under duress,<sup>13</sup> but without resistance. Assuming the facts to be as stated, the majority of the commissioners appointed to adjust claims between the United States and Chile, according to the convention of August 2, 1892, declared: "After an examination of many authorities on international law and numerous decisions of courts, we are of opinion that the United States committed an act for which they are liable in damages and for which they should be held to answer."<sup>14</sup> But it appears that this decision was made on the basis of a demurrer on the part of the United States, and the facts were that the *Itata* was never pursued into Chilean waters and that her surrender on the part of the Chilean authorities was voluntary.<sup>15</sup>

Thus it will be seen that the authorities are divided on the question as to the validity of "hot pursuit" on the high seas, although it must be admitted that the weight of authority favors the doctrine and that the practice has the sanction of at least Anglo-American custom.

Of course, it is evident that the analogy between "hot pursuit"

<sup>12</sup> See also Dana's note 108 to Wheaton, 8th ed., § 179, pp. 259-60, and I Moore, Digest, § 151, p. 729.

<sup>13</sup> For this version of the facts of the case, see the South American Steamship Co. v. United States, in United States and Chilean Claims Commission, Vol. I, No. 18, *passim*. For the violations of neutrality of which the *Itata* had been guilty, see U. S. v. Trumbull (1891), 48 Fed. Rep. 99, and Scott, 731.

<sup>14</sup> III Moore's International Arbitrations, p. 3070.

<sup>15</sup> See United States and Chilean Claims Commission (1901), Decision No. 21, pp. 209 ff.

at sea and on land is very imperfect, since the high seas constitute an international highway and lie outside the jurisdiction of any single state. However, the provocation and the necessity of self-defence and protection may be even greater on land than at sea. In any case, there is ample precedent for the practice of "hot pursuit" in our past relations with Mexico.

AMOS S. HERSHEY.

## CURRENT NOTES

### THE LEAGUE OF NATIONS

ADDRESS OF PRESIDENT WILSON ON PRESENTING THE DRAFT OF THE  
COVENANT OF THE LEAGUE OF NATIONS TO THE THIRD PLENARY  
SESSION OF PEACE CONFERENCE AT PARIS,<sup>1</sup> FEBRUARY 14, 1918

MR. CHAIRMAN: I have the honor and I esteem it the very great privilege of reporting in the name of the commission constituted by this Conference on the formulation of a plan for the League of Nations. I am happy to say that it is a unanimous report, a unanimous report from the representatives of fourteen nations—the United States, Great Britain, France, Italy, Japan, Belgium, Brazil, China, Czecho-Slovakia, Greece, Poland, Portugal, Roumania, and Serbia. I think it will be serviceable and interesting if I, with your permission, read the document as the only report we have to make.

[President Wilson read the original draft as printed in the Supplement to this Journal, April, 1919, p. 113. During the reading, the President made the following oral explanatory interpolations.]

#### After the second paragraph of Article XV:

I pause to point out that a misconception might arise in connection with one of the sentences I have just read: "If any party shall refuse so to comply, the council shall propose the measures necessary to give effect to the recommendation." A case in point, a purely hypothetical case, is this: Suppose that there is in the possession of a particular Power a piece of territory or some other substantial thing in dispute to which it is claimed that it is not entitled. Suppose that the matter is submitted to the Executive Council for a recommendation as to the settlement of the dispute, diplomacy having failed; and suppose that the decision is in favor of the party which claims the subject-matter of dispute as against the party which has the subject-matter in dispute. Then, if the party in possession of the subject-matter in dispute merely sits still and does nothing, it has accepted the decision of the Council, in the sense that it makes no resistance; but something must be done to see that it surrenders the subject-matter in dispute. In such a case, the only case contemplated,

<sup>1</sup> Addresses of President Wilson on First Trip to Europe. Washington: Government Printing Office. 1919. pp. 47 *et seq.*

it is provided that the Executive Council may then consider what steps may be necessary to oblige the party against whom judgment has gone to comply with the decisions of the Council.

#### Before Article XIX:

Let me say before reading Article XIX, that before being embodied in this document it was the subject-matter of a very careful discussion by representatives of the five greater parties, and that their unanimous conclusion in the matter is embodied in this article.

It gives me pleasure to add to this formal reading of the result of our labors that the character of the discussion which occurred at the sittings of the commission was not only of the most constructive but of the most encouraging sort. It was obvious throughout our discussions that, although there were subjects upon which there were individual differences of judgment, with regard to the method by which our objects should be obtained, there was practically at no point any serious difference of opinion or motive as to the objects which we were seeking. Indeed, while these debates were not made the opportunity for the expression of enthusiasms and sentiments, I think the other members of the commission will agree with me that there was an undertone of high resolve and of enthusiasm for the thing we were trying to do, which was heartening throughout every meeting; because we felt that in a way this Conference had entrusted to us the expression of one of its highest and most important purposes, to see to it that the concord of the world in the future with regard to the objects of justice should not be subject to doubt or uncertainty; that the coöperation of the great body of nations should be assured from the first in the maintenance of peace upon the terms of honor and of the strict regard for international obligation. The compulsion of that task was constantly upon us, and at no point was there shown the slightest desire to do anything but suggest the best means to accomplish that great object. There is very great significance, therefore, in the fact that the result was reached unanimously. Fourteen nations were represented, among them all of those Powers which for convenience we have called the great Powers, and among the rest a representation of the greatest variety of circumstance and interest. So that I think we are justified in saying that it was a representative group of the members of this great Conference. The significance of the result, therefore, has that deepest of all meanings, the union of

wills in a common purpose, a union of wills which cannot be resisted, and which I dare say no nation will run the risk of attempting to resist.

Now, as to the character of the document. While it has consumed some time to read this document, I think you will see at once that it is, after all, very simple, and in nothing so simple as in the structure which it suggests for the League of Nations—a body of delegates, an executive council, and a permanent secretariat. When it came to the question of determining the character of the representation in the Body of Delegates, we were all aware of a feeling which is current throughout the world. Inasmuch as I am stating it in the presence of official representatives of the various Governments here present, including myself, I may say that there is a universal feeling that the world can not rest satisfied with merely official guidance. There reached us through many channels the feeling that if the deliberative body of the League was merely to be a body of officials representing the various Governments, the peoples of the world would not be sure that some of the mistakes which preoccupied officials had admittedly made might not be repeated. It was impossible to conceive a method or an assembly so large and various as to be really representative of the great body of the peoples of the world, because, as I roughly reckon it, we represent as we sit around this table more than twelve hundred million people. You can not have a representative assembly of twelve hundred million people, but if you leave it to each government to have, if it pleases, one or two or three representatives, though only a single vote, it may vary its representation from time to time, not only, but it may originate the choice of its several representatives, if it should have several, in different ways. Therefore, we thought that this was a proper and a very prudent concession to the practically universal opinion of plain men everywhere that they wanted the door left open to a variety of representation instead of being confined to a single official body with which they might or might not find themselves in sympathy.

And you will notice that this body has unlimited rights of discussion—I mean of discussion of anything that falls within the field of international relationship—and that it is specially agreed that war or international misunderstandings or anything that may lead to friction and trouble is everybody's business, because it may affect the peace of the world. And in order to safeguard the popular power



so far as we could of this representative body, it is provided, you will notice, that when a subject is submitted, not to arbitration, but to discussion by the Executive Council, it can, upon the initiative of either one of the parties to the dispute, be drawn out of the Executive Council onto the larger forum of the general Body of Delegates, because throughout this instrument we are depending primarily and chiefly upon one great force, and that is the moral force of the public opinion of the world—the cleansing and clarifying and compelling influences of publicity—so that intrigues can no longer have their coverts, so that designs that are sinister can at any time be drawn into the open, so that those things that are destroyed by the light may be properly destroyed by the overwhelming light of the universal expression of the condemnation of the world.

Armed force is in the background of this program, but it is in the background, and if the moral force of the world will not suffice, the physical force of the world shall. But that is the last resort, because this is intended as a constitution of peace, not as a league of war.

The simplicity of the document seems to me to be one of its chief virtues, because, speaking for myself, I was unable to foresee the variety of circumstances with which this League would have to deal. I was unable, therefore, to plan all the machinery that might be necessary to meet differing and unexpected contingencies. Therefore, I should say of this document that it is not a straitjacket, but a vehicle of life. A living thing is born, and we must see to it that the clothes we put upon it do not hamper it—a vehicle of power, but a vehicle in which power may be varied at the discretion of those who exercise it and in accordance with the changing circumstances of the time. And yet, while it is elastic, while it is general in its terms, it is definite in the one thing that we were called upon to make definite. It is a definite guarantee of peace. It is a definite guarantee by word against aggression. It is a definite guarantee against the things which have just come near bringing the whole structure of civilization into ruin. Its purposes do not for a moment lie vague. Its purposes are declared and its powers made unmistakable.

It is not in contemplation that this should be merely a league to secure the peace of the world. It is a league which can be used for coöperation in any international matter. That is the significance of the provision introduced concerning labor. There are many

ameliorations of labor conditions which can be affected by conference and discussion. I anticipate that there will be a very great usefulness in the Bureau of Labor which it is contemplated shall be set up by the League. While men and women and children who work have been in the background through long ages, and sometimes seemed to be forgotten, while governments have had their watchful and suspicious eyes upon the maneuvers of one another, while the thought of statesmen has been about structural action and the large transactions of commerce and of finance, now, if I may believe the picture which I see, there comes into the foreground the great body of the laboring people of the world, the men and women and children upon whom the great burden of sustaining the world must from day to day fall, whether we wish it to do so or not; people who go to bed tired and wake up without the stimulation of lively hope. These people will be drawn into the field of international consultation and help, and will be among the wards of the combined governments of the world. There is, I take leave to say, a very great step in advance in the mere conception of that.

Then, as you will notice, there is an imperative article concerning the publicity of all international agreements. Henceforth no member of the League can claim any agreement valid which it has not registered with the Secretary General, in whose office, of course, it will be subject to the examination of anybody representing a member of the League. And the duty is laid upon the Secretary General to publish every document of that sort at the earliest possible time. I suppose most persons who have not been conversant with the business of foreign offices do not realize how many hundreds of these agreements are made in a single year, and how difficult it might be to publish the more unimportant of them immediately—how uninteresting it would be to most of the world to publish them immediately—but even they must be published just so soon as it is possible for the Secretary General to publish them.

Then there is a feature about this covenant which to my mind is one of the greatest and most satisfactory advances that have been made. We are done with annexations of helpless people, meant in some instances by some Powers to be used merely for exploitation. We recognize in the most solemn manner that the helpless and undeveloped peoples of the world, being in that condition, put an obligation upon us to look after their interests primarily before we use

them for our interest; and that in all cases of this sort hereafter it shall be the duty of the League to see that the nations who are assigned as the tutors and advisers and directors of those peoples shall look to their interest and to their development before they look to the interests and material desires of the mandatory nation itself. There has been no greater advance than this, gentlemen. If you look back upon the history of the world you will see how helpless peoples have too often been a prey to Powers that had no conscience in the matter. It has been one of the many distressing revelations of recent years that the great Power which has just been happily defeated put intolerable burdens and injustices upon the helpless people of some of the colonies which it annexed to itself; that its interest was rather their extermination than their development; that the desire was to possess their land for European purposes, and not to enjoy their confidence in order that mankind might be lifted in those places to the next higher level. Now, the world, expressing its conscience in law, says there is an end of that. Our consciences shall be applied to this thing. States will be picked out which have already shown that they can exercise a conscience in this matter, and under their tutelage the helpless peoples of the world will come into a new light and into a new hope.

So I think that I can say of this document that it is at one and the same time a practical document and a humane document. There is a pulse of sympathy in it. There is a compulsion of conscience throughout it. It is practical, and yet it is intended to purify, to rectify, to elevate. And I want to say that, so far as my observation instructs me, this is in one sense a belated document. I believe that the conscience of the world has long been prepared to express itself in some such way. We are not just now discovering our sympathy for these people and our interest in them. We are simply expressing it, for it has long been felt, and in the administration of the affairs of more than one of the great states represented here—so far as I know, of all the great states that are represented here—that humane impulse has already expressed itself in their dealings with their colonies whose peoples were yet at a low stage of civilization. We have had many instances of colonies lifted into the sphere of complete self-government. This is not the discovery of a principle. It is the universal application of a principle. It is the agreement of the great nations which have tried

to live by these standards in their separate administrations to unite in seeing that their common force and their common thought and intelligence are lent to this great and humane enterprise. I think it is an occasion, therefore, for the most profound satisfaction that this humane decision should have been reached in a matter for which the world has long been waiting and until a very recent period thought that it was still too early to hope.

Many terrible things have come out of this war, gentlemen, but some very beautiful things have come out of it. Wrong has been defeated, but the rest of the world has been more conscious than it ever was before of the majesty of right. People that were suspicious of one another can now live as friends and comrades in a single family, and desire to do so. The miasma of distrust, of intrigue, is cleared away. Men are looking eye to eye and saying, "We are brothers and have a common purpose. We did not realize it before, but now we do realize it, and this is our covenant of fraternity and friendship."

EXTRACT FROM THE ADDRESS OF THE PRESIDENT OF THE UNITED STATES TO  
THE SENATE RELATIVE TO THE SECTION OF THE TREATY OF PEACE  
WITH GERMANY DEALING WITH THE LEAGUE OF NATIONS,  
JULY 10, 1919

In all quarters of the world old established relationships had been disturbed or broken and affairs were at loose ends, needing to be mended or united again, but could not be made what they were before. They had to be set right by applying some uniform principle of justice or enlightened expediency. And they could not be adjusted by merely prescribing in a treaty what should be done. New states were to be set up which could not hope to live through their first period of weakness without assured support by the great nations that had consented to their creation and won for them their independence. Ill-governed colonies could not be put in the hands of governments which were to act as trustees for their people and not as their masters if there was to be no common authority among the nations to which they were to be responsible in the execution of their trust. Future international conventions with regard to the control of waterways, with regard to illicit traffic of many kinds, in arms or in deadly drugs,

or with regard to the adjustment of many varying international administrative arrangements, could not be assured if the treaty were to provide no permanent common international agency, if its execution in such matters was to be left to the slow and uncertain processes of coöperation by ordinary methods of negotiation.

If the Peace Conference itself was to be the end of coöperative authority and common counsel among the governments to which the world was looking to enforce justice and give pledges of an enduring settlement, regions like the Saar basin could not be put under a temporary administrative régime which did not involve a transfer of political sovereignty and which contemplated a final determination of its political connections by popular vote to be taken at a distant date; no free city like Danzig could be created which was, under elaborate international guarantees, to accept exceptional obligations with regard to the use of its port and exceptional relations with a state of which it was not to form a part; properly safeguarded plebiscites could not be provided, for where populations were at some future date to make choice what sovereignty they would live under; no certain and uniform method of arbitration could be secured for the settlement of anticipated difficulties of final decision with regard to many matters dealt with in the treaty itself; the long-continued supervision of the task of reparation which Germany was to undertake to complete within the next generation might entirely break down; the reconsideration and revision of administrative arrangements and restrictions which the treaty prescribed, but which it was recognized might not prove of lasting advantage or entirely fair if too long enforced would be impracticable.

The promises governments were making to one another about the way in which labor was to be dealt with, by law not only but in fact as well, would remain a mere humane thesis if there was to be no common tribunal of opinion and judgment to which liberal statesmen could resort for the influences which alone might secure their redemption. A league of free nations had become a practical necessity. Examine the treaty of peace and you will find that everywhere throughout its manifold provisions its framers have felt obliged to turn to the League of Nations as an indispensable instrumentality for the maintenance of the new order it has been their purpose to set up in the world—the world of civilized men.

That there should be a League of Nations to steady the counsels

and maintain the peaceful understandings of the world, to make, not treaties alone, but the accepted principles of international law as well, the actual rule of conduct among the governments of the world, had been one of the agreements accepted from the first as the basis of peace with the Central Powers. The statesmen of all the belligerent countries were agreed that such a league must be created to sustain the settlements that were to be effected. But at first I think there was a feeling among some of them that, while it must be attempted, the formation of such a league was perhaps a counsel of perfection which practical men, long experienced in the world of affairs, must agree to very cautiously and with many misgivings.

It was only as the difficult work of arranging an all but universal adjustment of the world's affairs advanced from day to day from one stage of conference to another that it became evident to them that what they were seeking would be little more than something written upon paper, to be interpreted and applied by such methods as the chances of politics might make available if they did not provide a means of common counsel which all were obliged to accept, a common authority whose decisions would be recognized as decisions which all must respect.

And so the most practical, the most skeptical among them turned more and more to the league as the authority through which international action was to be secured, the authority without which, as they had come to see it, it would be difficult to give assured effect either to this treaty or to any other international understanding upon which they were to depend for the maintenance of peace. The fact that the Covenant of the League was the first substantive part of the treaty to be worked out and agreed upon, while all else was in solution, helped to make the formulation of the rest easier. The Conference was, after all, not to be ephemeral. The concert of nations was to continue, under a definite Covenant which had been agreed upon and which all were convinced was workable. They could go forward with confidence to make arrangements intended to be permanent. The most practical of the conferees were at last the most ready to refer to the League of Nations the superintendence of all interests which did not admit of immediate determination, of all administrative problems which were to require a continuing oversight. What had seemed a counsel of perfection had come to seem a plain counsel of

necessity. The League of Nations was the practical statesman's hope of success in many of the most difficult things he was attempting.

And it had validated itself in the thought of every member of the Conference as something much bigger, much greater every way, than a mere instrument for carrying out the provisions of a particular treaty. It was universally recognized that all the peoples of the world demanded of the Conference that it should create such a continuing concert of free nations as would make wars of aggression and spoliation such as this that has just ended forever impossible. A cry had gone out from every home in every stricken land from which sons and brothers and fathers had gone forth to the great sacrifice that such a sacrifice should never again be exacted. It was manifest why it had been exacted. It had been exacted because one nation desired dominion and other nations had known no means of defense except armaments and alliances. War had lain at the heart of every arrangement of the Europe—of every arrangement of the world—that preceded the war. Restive peoples had been told that fleets and armies, which they toiled to sustain, meant peace; and they now knew that they had been lied to; that fleets and armies had been maintained to promote national ambitions and meant war. They knew that no old policy meant anything else but force, force,—always force. And they knew that it was intolerable. Every true heart in the world, and every enlightened judgment demanded that, at whatever cost of independent action, every government that took thought for its people or for justice or for ordered freedom should lend itself to a new purpose and utterly destroy the old order of international politics. Statesmen might see difficulties, but the people could see none and could brook no denial. A war in which they had been bled white to beat the terror that lay concealed in every Balance of Power must not end in a mere victory of arms and a new balance. The monster that had resorted to arms must be put in chains that could not be broken. The united power of free nations must put a stop to aggression, and the world must be given peace. If there was not the will or the intelligence to accomplish that now, there must be another and a final war and the world must be swept clean of every power that could renew the terror.

The League of Nations was not merely an instrument to adjust and remedy old wrongs under a new treaty of peace; it was the only

hope for mankind. Again and again had the demon of war been cast out of the house of the peoples and the house swept clean by a treaty of peace; only to prepare a time when he would enter in again with spirits worse than himself. The house must now be given a tenant who could hold it against all such. Convenient, indeed indispensable, as statesmen found the newly planned League of Nations to be for the execution of present plans of peace and reparation, they saw it in a new aspect before their work was finished. They saw it as the main object of the peace, as the only thing that could complete it or make it worth while. They saw it as the hope of the world, and that hope they did not dare to disappoint. Shall we or any other free people hesitate to accept this great duty? Dare we reject it and break the heart of the world?

LETTER OF HONORABLE ELIHU ROOT TO HONORABLE WILL H. HAYS  
REGARDING THE COVENANT OF THE LEAGUE OF NATIONS

NEW YORK, *March 29, 1919.*

The Honorable WILL H. HAYS,  
Chairman, etc.

DEAR SIR: I have received your letter of March 24 and I give you herewith at perhaps inordinate length my views regarding the proposed convention for a League of Nations.

I am sure that all of us earnestly desire that there shall be an effective international organization to preserve the peace of the world, and that our country shall do its full share toward the establishment and maintenance of such an organization. I do not see much real controversy about that among the American people, either between parties, or within parties, or otherwise.

There is, however, a serious question whether the particular proposed agreement which is now under discussion by the Peace Conference in Paris under the title a "Constitution of a League of Nations" will accomplish that end in its present form, and whether it cannot be made more effective and free from objection. A careful study of the paper under the urging of intense interest in the subject has led me to the conclusion that a large part of its provisions will be of great value, but that it has very serious faults, which may



lead to the ultimate failure of the whole scheme unless they are remedied, and some faults which unnecessarily and without any benefit whatever to the project tend to embarrass and hinder the United States in giving its full support to the scheme.

I think there should be several very important amendments to the agreement.

This seems to be the general view. Mr. Taft, who joined the President in advocating the agreement, says it ought to be amended, almost as strongly as his former Secretary of State, Senator Knox, says the same thing. When Mr. Lodge and Mr. Lowell had their great debate in Boston both said the agreement ought to be amended.

A discussion of the merits and faults of the scheme with a view to amendment is now the regular order of business. It was to give an opportunity for such a discussion that the paper was reported to the Paris Conference and made public by the committee that prepared it.

At the time of the report, Lord Robert Cecil, who represented Great Britain in the committee, said: "I rejoice very much that the course which has been taken this afternoon has been pursued. It seems to me a good omen for the great project in which we are engaged that before its final completion it should have been published to the world and laid before all its people for their service and for their criticism."

Signor Orlando, who represented Italy, said: "We all expect from the discussion and development of the present act a renewal of the whole world, but, as the present debate has for its object to bring the whole scheme before the public opinion of the world, I wish to bring to that debate my personal contribution."

M. Leon Bourgeois, who represented France in the committee, said: "Lord Robert Cecil has said we now present to the Conference and to the world the result of our work, but we do not present it as something that is final, but only as the result of an honest effort to be discussed and to be examined not only by this Conference, but the public opinion of the world."

At that very time M. Bourgeois suggested an amendment about which I shall say something presently, and he went on to say: "The observations we have made on some points will, we hope, be of some value in the further discussions, since we are at the beginning of the examination of the whole plan."

These gentlemen represented all the great Allies by whose side we have been fighting in Europe, and it is plain that they expected and wished that the scheme which they had reported should be subjected to public discussion and criticism in their own countries and in ours. It is also plain that they saw no reason why the proposed agreement should be rushed through in such haste that there would not be an opportunity for public discussion and criticism, and for communicating the results to the Conference.

Under our Constitution it is the business of the Senate to take the lead in such a discussion, to compare the different opinions expressed in the several States and to draft in proper form the amendments which the public judgment seems to call for. It is unfortunate that the Senate has not been permitted to perform that duty in this case. It seems to me that the Senate ought to have been convened for that purpose immediately after the 4th of March. In addition to the regular and extra sessions of Congress the Senate has been convened separately in special session forty-two times since it was first organized, ordinarily to confirm a few appointments or pass on unimportant treaties, never for any reason more important than exists now.

There is a special reason why the Senate should consider this proposed agreement. Ordinarily treaties are negotiated by ambassadors, ministers, or delegates, and their work is supervised and corrected if need be by the President and Secretary of State at Washington, who from their different points of view frequently see things the actual negotiators overlook. In this case, since the President himself is negotiating the treaty in Paris, there is no one in Washington to supervise the negotiation, and there is no one with authority to give the negotiators the benefit of independent official judgment, unless the Senate is to perform that function.

This situation throws upon the people of the country the duty to answer the expectations of the Conference by studying and discussing and expressing their opinions on the various provisions of the proposed agreement, and to make their expressions of opinion heard the best way they can.

The avowed object of the agreement is to prevent future wars. That is what interests us. We are not trying to get anything for ourselves from the Paris Conference. We are not asking any help from the other nations who are in the Conference, but we would like

to do our part toward preventing future wars. How does the proposed scheme undertake to do that?

To answer that question one must call to mind the conditions to which the scheme is to be applied.

All the causes of war fall in two distinct classes.

One class consists of controversies about rights under the law of nations and under treaties. In a general way these are described as justiciable or judicial questions. They are similar to the questions between individuals which courts are all the time deciding. They cover by far the greater number of questions upon which controversies between nations arise.

For more than half a century the American Government has been urging upon the world the settlement of all such questions by arbitration. Presidents Grant, Arthur, Harrison, Cleveland, McKinley, Roosevelt and Taft strongly approved the establishment of a system of arbitration in their messages to Congress. Thirty years ago our Congress adopted a resolution requesting the President to invite negotiations with every other Government "to the end that any differences or disputes arising between the two Governments which cannot be adjusted by diplomatic agency may be referred to arbitration and be peaceably adjusted by such means."

President McKinley in his first inaugural declared: "The adjustment of difficulties by judicial methods rather than force of arms has been recognized as the leading feature of our foreign policy throughout our entire national history."

We have illustrated the benefits of this method of settling disputes by the Alabama arbitration in 1872, the Bering Sea arbitration in 1893, the Alaska boundary tribunal in 1903, the North Atlantic fisheries arbitration in 1910.

The two great international conferences at The Hague in 1899 and in 1907 established a permanent court of arbitration and rules of procedure. They also made great progress in agreeing upon and codifying the rules of international law which this court was to administer.

There was a weakness in the system devised by The Hague Conference. It was that arbitration of these justiciable questions was not made obligatory, so that no nation could bring another before the court unless the defendant was willing to come, and there was no way to enforce a judgment.

But the public opinion of the world grew. Nations began to make obligatory treaties of arbitration with one another. Hundreds of such treaties were made. The United States made some thirty such treaties with most of the principal countries in the world agreeing absolutely to arbitrate questions arising under international law and upon the interpretation of treaties.

A strong opinion arose in favor of establishing an international court composed of judges who would devote their entire time to the business of the court. The Second Hague Conference adopted a plan for such a court, and while Mr. Knox was Secretary of State he negotiated a treaty with the other great Powers for its effective establishment. It became evident that the world was ready for obligatory arbitration of justiciable questions.

After the great war began the American "League to Enforce Peace," at the head of which are Mr. Taft and Mr. Lowell, made the first plank in its platform that "All justiciable questions arising between the signatory Powers not settled by negotiation shall—subject to the limitation of treaties—be submitted to a judicial tribunal for hearing and judgment, etc."

A similar group in Great Britain, of which Lord Bryce was a leading spirit, made the first plank in its platform the following:

The signatory Powers to agree to refer to the existing Permanent Court of Arbitration at the Hague, or to the Court of Arbitral Justice proposed at the Second Hague Conference, if and when such court shall be established, or to some other arbitral tribunal, all disputes between them (including those affecting honor and vital interests) which are of a justiciable character, and which the Powers concerned have failed to settle by diplomatic methods.

And both of these groups proposed to provide for enforcing the judgments of the court by economic pressure or by force.

The other class of disputes which give rise to war consists of clashes between conflicting national policies, as distinguished from claims of legal right. They do not depend upon questions of law or treaty, but upon one nation or ruler undertaking to do something that another nation or ruler wishes to prevent.

Such questions are a part of international politics. They are similar to the questions as to which our courts say "This is a political question, not a judicial question, and we have no concern with it." The question whether Russia should help Servia when Austria in-

vaded Serbia in July, 1914, is an illustration. Our own Monroe Doctrine is another illustration. That is not an assertion of any legal right, but it is a declaration that certain acts will be regarded as dangerous to the peace and safety of the United States and therefore unfriendly.

Such questions are continually arising in Europe and the Near East, and the way in which the European countries have been in the habit of dealing with them has been to bring about a conference of the representatives of the different nations to discuss the subject and find some way of reconciling the differences, or of convincing the parties to the dispute that it would not be safe for them to break the peace.

For example, in 1905, when the German Emperor's dramatic challenge of the policy of France as to Morocco had made war seem probable, the Algeiras Conference was brought about largely by the influence of President Roosevelt and that conference resulted in preventing war. In 1912, when the Balkan wars had brought Europe apparently to the verge of universal war, the Ambassadors of all the great Powers met in London and the result of their conference was to avert war. So, in the last week of July, 1914, Sir Edward Grey tried to bring about another conference for the purpose of averting the great war in which we have been engaged, but Germany refused to attend the conference, and she refused because she meant to bring on the war, and knew that if she attended a conference it would become practically impossible for her to do so.

The weak point about this practice of international conferences in times of danger was that they were left solely to the initiative of the individual nations; that nobody had a right to call a conference and nobody was bound to attend one.

The great and essential thing about the plan contained in this "Constitution for a League of Nations" is that it makes international conferences on political questions compulsory in times of danger; that it brings together such conferences upon the call of officers who represent all the Powers and makes it practically impossible for any nation to keep out of them.

This effect is produced by the provisions of Article 15, relating to the submission of disputes to the Executive Council of the League or upon demand of either party to the Body of Delegates. Article 15 is the central and controlling article of the agreement. Putting

out of consideration for the moment Article 10, which relates to a mutual guarantee of territory, Articles 8 and 9, which relate to the reduction of armaments, and Article 19, which relates to mandatories, all the other important articles in the agreement are designed to make effective the conference of the Powers resulting from the submission of a dispute upon a question of policy under Article 15.

Especially important among these ancillary articles is Article 11, which declares war or threat of war to be a matter of concern to the whole League; Article 12, which prohibits going to war without the submission of the dispute and without allowing time for its settlement, or contrary to a unanimous recommendation of the Executive Council or an award of arbitrators (if there shall have been an arbitration), and Article 16, which provides for enforcing the provisions of Article 12 by economic boycott or, should the Powers choose to do so, by military force.

I think these provisions are well devised and should be regarded as free from any just objection, so far as they relate to the settlement of the political questions at which they are really aimed. The provisions, which, taken together, accomplish this result, are of the highest value. They are developed naturally from the international practice of the past. They are a great step forward. They create an institution through which the public opinion of mankind, condemning unjust aggression and unnecessary war, may receive, effect, and exert its power for the preservation of peace, instead of being dissipated in fruitless protest or lamentation. The effect will be to make the sort of conference which Sir Edward Grey tried in vain to get for the purpose of averting this great war obligatory, inevitable, automatic. I think everybody ought to be in favor of that.

I repeat that this scheme for the settlement of political questions such as brought about the present war is of very great practical value and it would be a sad thing if this opportunity for the establishment of such a safeguard against future wars should be lost.

This plan of automatic conference, however, is accompanied by serious defects.

The scheme practically abandons all effort to promote or maintain anything like a system of international law or a system of arbitration, or of judicial settlement, through which a nation can assert its legal rights in lieu of war. It is true that Article 13 mentions arbitration and makes the parties agree that whenever a dispute

arises "which they recognize to be suitable for submission to arbitration," they will submit it to a court "agreed upon by the parties." That, however, is merely an agreement to arbitrate when the parties choose to arbitrate, and it is therefore no agreement at all. It puts the whole subject of arbitration back where it was twenty-five years ago.

Instead of perfecting and putting teeth into the system of arbitration provided for by The Hague Conventions it throws those conventions upon the scrap heap. By covering the ground of arbitration and prescribing a new test of obligation it apparently by virtue of the provisions of Article 25 abrogates all the two hundred treaties of arbitration by which the nations of the world have bound themselves with one another to submit to arbitration all questions arising under international law, or upon the interpretation of treaties.

It is to be observed that neither the Executive Council nor the Body of Delegates to whom disputes are to be submitted under Article 15 of the agreement is in any sense whatever a judicial body or an arbitral body. Its function is not to decide upon anybody's right. It is to investigate, to consider and to make recommendations. It is bound to recommend what it deems to be expedient at the time. It is the states which act and not the individuals. The honorable obligation of each member is a political obligation as the representative of a state.

This is a method very admirable for dealing with political questions; but it is wholly unsuited to the determination of questions of right under the law of nations. It is true also that Article XIV mentions a Court of International Justice, and provides that the Executive Council should formulate plans for such a court, and that this court shall when established be competent to determine matters which the parties recognize as suitable for submission to it. There is no agreement or direction that such a court shall be established or that any questions shall be submitted to it.

International law is not mentioned at all, except in the preamble, no method is provided, and no purpose is expressed to insist upon obedience to law, to develop the law, to press forward agreement upon its rules and recognition of its obligations. All questions of right are relegated to the investigation and recommendation of a political body to be determined as matters of expediency.

I confess I cannot see the judgment of three generations of the

wisest and best of American statesmen concurred in by the wisest and the best of all our allies thus held for naught. I believe with them that—necessary as may be the settlement of political questions upon grounds of expediency—it is also necessary to insist upon rules of international conduct founded upon principles, and that the true method by which public right shall be established to control the affairs of nations is by the development of law and the enforcement of law according to the judgments of impartial tribunals. I should have little confidence in the growth or permanence of an international organization which applied no test to the conduct of nations except the expediency of the moment.

The first change which I should make in this agreement accordingly would be to give effectiveness to the judicial settlement of international disputes upon questions of right—upon justiciable or judicial questions—by making the arbitration of such questions obligatory under the system established by The Hague Conferences, or before the proposed Court of Arbitral Justice, or, if the parties prefer in any particular case, before some specially constituted tribunal; putting the whole world upon the same footing in that respect that has been created between the United States and practically every nation now represented in Paris, by means of the special treaties which we have made with them. The term "Justiciable Questions" should be carefully defined, so as to exclude all questions of policy, and to describe the same kind of questions the Supreme Court of the United States has been deciding for more than a century.

When that is done the reference to arbitration in Article XII will have some force and effect instead of being as it is now—a mere idle form.

The second change which I think should be made is to provide for a general conference followed by regular conferences at stated intervals to discuss, agree upon and state in authentic form the rules of international law, so that the development of law may go on, and arbitral tribunals may have continually a more perfect system of rules of right conduct to apply in their decisions.

I send you herewith drafts of two suggested amendments designed to accomplish these results.

The distinction between the treatment of questions of legal right and questions of policy which I have drawn above has an important



bearing upon the attitude of the United States toward the settlement of disputes.

So far as the determination of justiciable questions arising under the law of nations or under treaties is concerned, we ought to be willing to stand on precisely the same footing with all other nations. We should be willing to submit our legal rights to judicial decision, and to abide by the decision. We have shown that we are willing to do that by the numerous treaties that we have made with the greater part of the world agreeing to do that, and we should be willing to have the same thing provided for in this general agreement.

With regard to questions of policy, however, some different considerations are apparent.

In determining the extent of our participation in the political affairs of the Old World, we ought to be satisfied that a sufficient affirmative reason exists for setting aside to that extent the long established policy of the United States to keep the Old and the New World from becoming entangled in each other's affairs and embroiled in each other's quarrels. Just so far as such a reason exists, we ought to go, but no further.

We have to start in the consideration of such a subject with the words of Washington's Farewell Address: "Europe has a set of primary interests which to us have none or a very remote relation. Hence, she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships or enmities." And Jefferson's advice to Monroe: "Our first and fundamental maxim should be never to entangle ourselves in the broils of Europe; our second, never to suffer Europe to intermeddle with cis-Atlantic affairs."

Unquestionably, the Old and the New World have come into much more intimate relations since the time of Washington and Jefferson, and they have many more interests in common. Nevertheless, the basis of the expressions I have quoted remains in substance. The people of the United States have no direct interest in the distribution of territory in the Balkans, or the control of Morocco, and the peoples of Europe have no direct interest in the questions between Chile and Peru, or between the United States and Colombia. Based upon this fact, the Monroe Doctrine has hitherto kept the Old World and the

New in two separate fireproof compartments so that a conflagration in one did not extend to the other.

There never was a time when the wisdom of the Monroe Doctrine for the preservation of peace and safety of the United States was more evident than it is now. Some facile writers of late have pronounced the doctrine obsolete and useless, but I know of no experienced and responsible American statesman who has ever taken that view, and I cannot help feeling that such a view results from insufficient acquaintance with the subject.

There has, however, arisen in these days for the American people a powerful secondary interest in the affairs of Europe coming from the fact that war in Europe and the Near East threatens to involve the entire world, and the peaceable nations of Europe need outside help to put out the fire, and keep it from starting again. That help to preserve peace we ought to give, and that help we wish to give.

In agreeing to give it, the following considerations should be observed:

We are not asking, and do not need, any help from the nations of the Old World for the preservation of peace in America, nor is any American nation asking for such help. The difficulties, the disturbing conditions, the dangers that threaten, are all in the affairs of Europe and the Near East. The real reason for creating a League of Nations is to deal with those difficulties and dangers, not with American affairs. It is, therefore, wholly unnecessary for the purpose of the League that purely American affairs should be included within the scope of the agreement.

When we enter into the League of Nations we do so not with any desire to interfere in the concerns of foreign nations, but because the peaceable nations of Europe ask us to put our power behind theirs to preserve peace in their part of the world. It is not reasonable, therefore, that such participation as we agree to in the activities of the League should be made the basis of an inference that we are trying to interfere in the Old World, and therefore should abandon our objection to having the Old World interfere in America.

With reference to the most important American questions, Europe as a whole on one side and the United States on the other occupy positions which however friendly are nevertheless in opposition. It must be remembered that the League of Nations contemplates the membership not only of our present allies, but ultimately of all the

nations of Europe. Now, the Monroe Doctrine was declared against those nations of Europe. It was a warning to them not to trespass on American territory and, admitting exceptions and speaking only in the most general way, the nations of Europe are on one side of that question and the United States is on the other. To submit the policy of Monroe to a council composed chiefly of European Powers is to surrender it.

I will add—without taking up space to discuss it—that I cannot escape the conclusion that to ratify this agreement as it now stands would itself be a surrender of the Monroe Doctrine, and that the agreement as it now stands gives to the United States no effective substitute for the protection which the maintenance of that doctrine affords.

The same thing is true of immigration. The nations of Europe in general are nations from which emigrants go. The United States is a nation to which immigrants come. Apart from Great Britain, which would be bound to look after the similar interests of Canada and Australia, Europe and America are bound to look at questions of emigration and immigration from different points of view, and under the influence of different interests—friendly indeed, but opposing.

It hardly seems reasonable that under these circumstances the United States should be penalized for complying with the request of its friends in Europe to join them in the preservation of peace, primarily for their benefit and not for ours, by giving up our right to self-protection when that is wholly unnecessary to accomplish the object of the agreement. I think, therefore, that these purely American questions ought to be excepted from the jurisdiction of the Executive Council and Body of Delegates, and I have prepared and annexed hereto a third amendment in the form of a reservation, this being the method which was followed without any objection to accomplish the same purpose at the close of both the Hague Conferences.

The fourth point upon which I think there should be an amendment is Article X, which contains the undertaking “to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League.”

Looking at this article as a part of a perpetual League for the Preservation of Peace, my first impression was that the whole article

ought to be stricken out. If perpetual, it would be an attempt to preserve for all time unchanged the distribution of power and territory made in accordance with the views and exigencies of the Allies in this present juncture of affairs. It would necessarily be futile. It would be what was attempted by the Peace of Westphalia at the close of the Thirty Years' War, by the Congress of Vienna at the close of the Napoleonic Wars, by the Congress of Berlin in 1878. It would not only be futile; it would be mischievous. Change and growth are the law of life, and no generation can impose its will in regard to the growth of nations and the distribution of power, upon succeeding generations.

I think, however, that this article must be considered not merely with reference to the future, but with reference to the present situation in Europe. Indeed, this whole agreement ought to be considered in that double aspect. The belligerent power of Germany, Austria, Bulgaria and Turkey has been destroyed; but that will not lead to future peace without a reconstruction of eastern Europe and western Asia. The vast territories of the Hohenzollerns, the Hapsburgs and the Romanoffs have lost the rulers who formerly kept the population in order, and are filled with turbulent masses without stable government, unaccustomed to self-control and fighting among themselves like children of the dragon's teeth. There can be no settled peace until these masses are reduced to order.

Since the Bolsheviki have been allowed to consolidate the control which they established with German aid in Russia, the situation is that Great Britain, France, Italy, and Belgium, with a population of less than 130,000,000 are confronted with the disorganized but vigorous and warlike population of Germany, German Austria, Hungary, Bulgaria, Turkey, and Russia, amounting approximately to 280,000,000, fast returning to barbarism and the lawless violence of barbarous races. Order must be restored. The allied nations in their council must determine the lines of reconstruction. Their determinations must be enforced. They may make mistakes. Doubtless they will, but there must be decision and decision must be enforced.

Under these conditions the United States cannot quit. It must go on to the performance of its duty, and the immediate aspect of Article X is an agreement to do that. I think, therefore, that Article X should be amended so that it shall hold a limited time, and there-

after any member may withdraw from it. I annex an amendment to that effect.

The fifth amendment which I think is needed is one suggested by M. Bourgeois in his speech at the conference which I have quoted above. It is to the provisions regarding the limitation of armaments. The success of those provisions is vital. If they are not effective the whole effort to secure future peace goes for nothing.

The plan of this League is contained in Articles 8 and 9. They provide that there shall be a reduction of national armaments to the lowest point consistent with national safety, that the Executive Council shall formulate plans for a general agreement as to the amount of these reductions, and that when an agreement has been made by the Powers the parties will not conceal from each other, but will give full and frank information regarding their industries capable of being adapted to warlike purposes, the scale of their armaments and their military and naval programmes.

Article 9 provides for a permanent commission to advise the League on the execution of these provisions. This full information is essential. Otherwise one nation will suspect another of secret preparation and will prepare to protect itself in the same way, so that the whole scheme of limitation will be destroyed. There would be some justification for this, because there are some nations of whom it would be idle to expect the truth on such a subject; their public officers would regard it as a duty to conceal and mislead. The only way to prevent that sort of thing is by giving the permanent commission power of inspection and verification. Every country should assent to this just as every trustee and treasurer is willing to have an independent audit of his accounts. I annex such an amendment.

Enough has been said already to indicate that this Constitution of a League of Peace cannot be regarded as a final and conclusive instrument. It necessarily leaves much to be determined hereafter. We do not know yet what nations are to be the members of the League, what nations are to be represented in the Council, what the limitations of armaments, what the regulations for the manufacture of munitions, or what the parties understand to be the scope of the provisions for freedom of transit and equitable treatment for commerce. The provision of Article 19 (of which I fully approve), relating to mandataries to aid or take charge of administration in new

states and old colonies, necessarily leaves both the selection of the mandataries and the character of their powers and duties unsettled. All these uncertainties are not matters for criticism, but of necessity, arising from the situation. Still more important is the fact that no one knows when or upon what terms the Central and Eastern Powers are to be admitted to the League.

The whole agreement is at present necessarily tentative. It cannot really be a League of Peace in operation for a number of years to come. It is now and in the immediate future must be rather an alliance of approximately one-half of the active world against or for the control of the other half. Under these circumstances it would be most unwise to attempt to give to this agreement finality and make the specific obligations of its members irrevocable. There should be provision for its revision in a calmer atmosphere and when the world is less subject to exciting and disturbing causes. In the meantime the agreement should not be deemed irrevocable. The last amendment which I annex is directed to that end.

If the amendments which I have suggested are made, I think it will be the clear duty of the United States to enter in the agreement.

In that case it would be the duty of Congress to establish by law the offices of representatives of the United States in the Body of Delegates and the Executive Council, just as the offices of Ambassadors and Ministers are already provided for by law, and the new offices would be filled by appointment of the President with the advice and consent of the Senate under Article II, Section 2, of the Constitution of the United States.

Very truly yours,

ELIHU ROOT.

### *Annexes*

#### FIRST AMENDMENT

Strike out Article XIII and insert the following:

The high contracting Powers agree to refer to the existing Permanent Court of Arbitration at The Hague, or to the Court of Arbitral Justice proposed at the Second Hague Conference when established, or to some other arbitral tribunal, all disputes between them (including those affecting honor and vital interests) which are of a justiciable character, and which the Powers concerned have failed to settle by diplomatic

methods. The Powers so referring to arbitration agree to accept and give effect to the award of the tribunal.

Disputes of a justiciable character are defined as disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the nature and extent of the reparation to be made for any such breach.

Any question which may arise as to whether a dispute is of a justiciable character is to be referred for decision to the Court of Arbitral Justice when constituted, or, until it is constituted, to the existing Permanent Court of Arbitration at The Hague.

#### SECOND AMENDMENT

Add to Article XIV the following paragraph:

The Executive Council shall call a general conference of the Powers to meet not less than two years or more than five years after the signing of this convention for the purpose of reviewing the condition of international law and of agreeing upon and stating in authoritative form the principles and rules thereof.

Thereafter regular conferences for that purpose shall be called and held at stated times.

#### THIRD AMENDMENT

Immediately before the signature of the American delegates insert the following reservation:

Inasmuch as in becoming a member of the League the United States of America is moved by no interest or wish to intrude upon or interfere with the political policy or internal administration of any foreign state and by no existing or anticipated dangers in the affairs of the American continents, but accedes to the wish of the European states that it shall join its power to theirs for the preservation of general peace, the representatives of the United States of America sign this convention with the understanding that nothing therein contained shall be construed to imply a relinquishment by the United States of America of its traditional attitude towards purely American questions, or to require the submission of its policy regarding such questions (including therein the admission of immigrants) to the decision or recommendation of other Powers.

#### FOURTH AMENDMENT

Add to Article X the following:

After the expiration of five years from the signing of this convention any party may terminate its obligation under this article by giving one year's notice in writing to the Secretary-General of the League.

## FIFTH AMENDMENT

Add to Article IX the following:

Such commission shall have full power of inspection and verification personally and by authorized agents as to all armament, equipment, munitions, and industries referred to in Article VIII.

## SIXTH AMENDMENT

Add to Article XXIV the following:

The Executive Council shall call a general conference of members of the League to meet not less than five or more than ten years after the signing of this convention for the revision thereof, and at that time, or at any time thereafter upon one year's notice, any member may withdraw from the League.

LETTER OF THE HONORABLE ELIHU ROOT TO SENATOR HENRY CABOT  
LODGE REGARDING THE COVENANT OF THE LEAGUE OF NATIONS <sup>1</sup>

NEW YORK, *June 19, 1919.*

The Honorable HENRY CABOT LODGE,  
WASHINGTON, D. C.

MY DEAR SENATOR: You were good enough to ask that after studying the whole of the proposed treaty with Germany and the amendments already made to the League of Nations part of it I should write you my opinion as to the amendments and as to the action which would be wise in view of existing international conditions.

I should be glad to see the peace terms and the League of Nations Covenant separated, as proposed in the resolution offered by Senator Knox, so that the latter could be considered by the people of the country without coercion from the necessities of speedy peace.

To avoid repetition, I inclose a copy of a letter which I wrote to Mr. Will H. Hays, March 29, 1919, proposing amendments to the League of Nations Covenant, and giving the reasons for them. Amendments similar in substance were proposed at about the same

<sup>1</sup> *Congressional Record*, June 23, 1919.



timé by many Americans familiar with public affairs both in and out of the Senate. The amendments subsequently made in the Covenant by the Paris Conference, while to some extent dealing with the subjects of the amendments so proposed, are very inadequate and unsatisfactory.

Nothing has been done to provide for the reestablishment and strengthening of a system of arbitration or judicial decision upon questions of legal right. Nothing has been done toward providing for the revision or development of international law. In these respects principles maintained by the United States without variation for half a century are still ignored, and we are left with a program which rests the hope of the whole world for future peace in a government of men, and not of laws, following the dictates of expediency, and not of right. Nothing has been done to limit the vast and incalculable obligation which Article 10 of the Covenant undertakes to impose upon each member of the League to preserve against external aggression the territorial integrity and political independence of all members of the League all over the world.

The clause authorizing withdrawal from the League upon two years' notice leaves a doubt whether a mere charge that we had not performed some international obligation would not put it in the power of the Council to take jurisdiction of the charge as a disputed question and keep us in the League indefinitely against our will.

The clause which has been inserted regarding the Monroe Doctrine is erroneous in its description of the doctrine and ambiguous in meaning. Other purely American questions, as, for example, questions relating to immigration, are protected only by a clause apparently empowering the Council to determine whether such questions are solely within the domestic jurisdiction of the United States. I do not think that in these respects the United States is sufficiently protected against most injurious results which are wholly unnecessary for the establishment and maintenance of this League of Nations.

On the other hand, it still remains that there is in the Covenant a great deal of very high value which the world ought not to lose. The arrangement to make conferences of the Powers automatic when there is danger of war; provisions for joint action as, of course, by representatives of the nations concerned in matters affecting common interests; the agreement for delay in case of serious disputes, with opportunity to bring the public opinion of the world to bear on the

disputants, and to induce cool and deliberate judgment; the recognition of racial and popular rights to the freedom of local self-government; and the plan, indispensable in some form, for setting up governments in the vast regions deprived by the war of the autocratic rule which had maintained order—all those ought not be lost if that can possibly be avoided. The condition of Europe requires prompt action. Industry has not revived there. Its revival requires raw materials. To obtain these credit is necessary, and for this there must be security for the fruits of enterprise, and for this there must be peace. Satan is finding evil work for idle hands to do in Europe—evil work that affects the whole world, including the United States.

Under these circumstances, what ought to be done?

I am clear that if the Covenant has to be considered with the peace terms included, the Senate ought to include in its resolution of consent to the ratification an expression of such reservations and understandings as will cure, so far as possible, the defects which I have pointed out. You will probably be unable to do anything now about the system of arbitration and the development of international law. You can, however, put into the resolution of consent a reservation refusing to agree to Article 10, and I think you should do so; you can clarify the meaning of the withdrawal article and you can also include in your resolution the substance of the third amendment which I proposed in my letter to Mr. Hays, of March 29, relating to purely American questions, and I think you should do so. These clauses of the resolution shape themselves in my own mind as follows:

The Senate of the United States advises and consents to the ratification of the said treaty with the following reservations and understandings to be made a part of the instrument of ratification, viz.:

(1) In advising and consenting to the ratification of the said treaty, the Senate reserves and excludes from its consent the tenth article of the Covenant for the League of Nations, as to which the Senate refuses its consent.

(2) The Senate consents to the ratification of the said treaty reserving Article 10 aforesaid with the understanding that whenever two years' notice of withdrawal from the League of Nations shall have been given, as provided in Article I, no claim, charge, or finding that international obligations or obligations under the Covenant have not been fulfilled will be deemed to render the two years' notice ineffectual or to keep the power giving the notice in the League after the expiration of the time specified in the notice.

(3) Inasmuch as in agreeing to become a member of the League of Nations, the United States of America is moved by no interest or wish to intrude upon or interfere with the political policy or international administration of any

foreign state, and by any existing or anticipated dangers in the affairs of the American Continents, but accedes to the wish of the European states that it shall join its powers to theirs for the preservation of general peace, the Senate consents to the ratification of the said treaty, excepting Article 10 aforesaid, with the understanding that nothing therein contained shall be construed to imply a relinquishment by the United States of America of its traditional attitude toward purely American questions, or to require the submission of its policy regarding questions which it deems to be purely American questions, to the decision or recommendation of other Powers.

This reservation and these expressions of understanding are in accordance with long-established precedent in the making of treaties. When included in the instrument of ratification they will not require a reopening of negotiation, but if none of the other signatories expressly objects to the ratification with such limitations, the treaty stands as limited as between the United States and the other Powers.

If any doubt were entertained as to the effect of such action, the doubt could be readily dispelled by calling upon the four other principal Powers represented in the Council to state whether they do in fact object to the entrance of the United States into the League with the understandings and reservations stated in the resolution.

As to these limiting clauses, I wish to say something further. As to Article 10:

First. It is not an essential or even an appropriate part of the provisions for a League of Nations to preserve peace. It is an independent and indefinite alliance which may involve the parties to it in war against Powers which have in every respect complied with the provisions of the League of Peace. It was not included in General Smuts's plan, the provisions of which have been reproduced almost textually in the League Covenant. It stands upon its own footing as an independent alliance for the preservation of the *status quo*.

Second. If we agree to this article, it is extremely probable that we shall be unable to keep our agreement. Making war nowadays depends upon the genuine sympathy of the people of the country at the time when the war has to be carried on. The people of the United States certainly will not be willing ten years or twenty years hence to send their young men to distant parts of the world to fight for causes in which they may not believe or in which they have little or no interest. If that is the attitude of the people when we are hereafter called upon to wage war under Article 10, no general, in-

definite agreement made years before will make them disposed to fight; and we shall be in about the worst possible position of having made an agreement and not keeping it.

Our people ought not to be forced into such a position, and we ought not to make any agreement that is liable to force them into such a position.

The recent controversies over the disposition of Kiaochow and of Fiume illustrate very well the way in which territorial arrangements are likely to be made in councils of the great Powers controlled by expediency. I would not vote to bind our country to go into a war in years to come in defense of those arrangements.

If it is necessary for the security of western Europe that we should agree to go to the support, say, of France if attacked, let us agree to do that particular thing plainly, so that every man and woman in the country will understand the honorable obligation we are assuming. I am in favor of that. But let us not wrap up such a purpose in a vague universal obligation under the impression that it really does not mean anything likely to happen.

Third. It is reported that Switzerland is much disturbed over the invitation to join the League of Nations and wishes to preserve her neutrality, because her people are partly French, partly German, and partly Italian, and she wishes to keep out of all quarrels which may involve those nationalities. In this country the census of 1910 showed that 35 per cent (more than one-third) of our people were of foreign birth or the children of foreign parents. We can call upon these people to stand by America in all American quarrels, but how can we control their sympathies and their actions if America interferes in foreign quarrels and takes sides in those quarrels against the countries to which they are attached by tradition and sentiment? How can we prevent dissension and hatred among our own inhabitants of foreign origin when this country interferes on foreign grounds between the races from which they spring? How can we prevent bitterness and disloyalty toward our own Government on the part of those against whose friends in their old homes we have intervened for no cause of our own? Article 10 confronts us with consequences very similar to those which Washington had in mind when he advised us to keep out of the quarrels of Europe and to keep the quarrels of Europe out of America. It is by following this wise policy that the United States has attained a position of unity and of disinter-

estedness which enables her to promote peace mightily, because she is not a party to the quarrels that threaten to disturb peace. She is free from suspicion; she is not the object of hatred or distrust; her friendship is valued; and her word is potent. We can be of infinitely more value to the peace of the world by keeping out of all the petty and selfish quarrels that arise than we can by binding ourselves to take part in them. Just so far as it is necessary to modify this settled historic American policy in order to put into effect a practical plan for a League of Nations to preserve peace we ought to go, and we ought not to go one step farther. The step proposed by Article 10 is not necessary for such a plan, and we ought not to take it.

As to the statement of understanding about American questions contained in the foregoing paragraph No. 3, the most ardent advocates for accepting the League Covenant exactly as it stands insist that the provisions already inserted about the Monroe Doctrine and other purely American questions mean just what this proposed resolution says. If that be true, then nobody can object to the resolution which puts the meaning beyond question. It is important not only for the interests of America, but for the peace of the world, that such provisions should be free from doubt and occasion for dispute. If, on the other hand, their view is wrong and the provisions already inserted may be construed not to mean what the resolution says, then the resolution certainly ought to be included in the consent to the ratification.

There is one other thing to be mentioned, that is, the recital of the proposed resolution (No. 3) disclaiming any intention by the United States to intrude upon or interfere with the political policy or internal administration of any foreign state. I think that to be of real importance, because I perceive evidence of an impression in Europe that the part taken by the representatives of the United States at Paris in the local questions and controversies of Europe indicates an abandonment by the United States of her traditional policy and a wish on her part to dictate to European states and control European affairs, thus assuming responsibility for those affairs. That impression should be dissipated. It is not well founded. I am sure that the people of the United States have no such intention or wish. Such interposition in the affairs of Europe as our representatives have been engaged in was properly but a temporary incident

to the fact that we had engaged in the war, and had therefore to discuss the terms of peace; and we should make it clear that we neither assume responsibility for nor intend interference in the affairs of Europe beyond that necessary participation under the organization of the League of Peace, which we enter upon, by the request of the European nations themselves.

To return to the subject of arbitration and the development of international law, I certainly should not advise regarding the League Covenant in its present form as the final word upon an organization for the preservation of the peace of the world. I think that when the Senate consents to the ratification of the treaty with some such reservations as I have indicated, it ought also to adopt a separate resolution not a part of the action upon the treaty, but practically at the same time, formally requesting the President without any avoidable delay to open negotiations with the other Powers for the reestablishment and strengthening of a system of arbitration for the disposition of international disputes upon questions of right, and for periodical meetings of representatives of all the Powers for the revision and development of international law.

I think that hereafter, when the life of Europe has become settled, when credit and industry are reestablished there and governments are stable and secure, and we know what reduction of armaments the Powers are going to consent to, the United States should insist upon a revision of the League Covenant. I am sure that the changed circumstances will then permit material improvement.

Faithfully yours,

ELIHU ROOT.

## JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

THE KRONPRINZESSIN VICTORIA (PART CARGO EX).<sup>1</sup>

*Judicial Committee of the Privy Council.*

November 13, 1918.

This was an appeal from a decree of the President of the Prize Court (the late Sir Samuel Evans) (34 *The Times* L. R., 7), pronouncing the part cargo of coffee shipped by Messrs. Nordskog and Co., of Rio de Janeiro, to the appellants, Messrs. Dahlen and Wahlstedt, of Sundsvall, Sweden, to be contraband of war and liable to confiscation.

Sir Erle Richards, K.C., and Mr. Balloch appeared for the appellants; the Solicitor-General, Mr. Stuart Bevan, and Mr. Clement Davies for the Crown.

The arguments were heard in July, when judgment was reserved.

LORD SUMNER, delivering their Lordships' judgment, said: In this case Sir Samuel Evans condemned 250 bags of coffee, conditional contraband of war, shipped by Nordskog and Co., in a Swedish steamship, for delivery to the appellants, who were claimants below, an incorporated Swedish company of wholesale grocers. The appellants swore that the coffee was part of a large quantity which they had previously bought from Nordskog and Co.; that they had declared before shipment that none of it was imported from, or would be sent to, an ulterior enemy destination, and that this declaration was true. The purchase contract and documentary evidence of payment for the coffee were forthcoming and their genuineness was not denied. The Crown put in evidence of a statistical character of the changes both in the general imports of coffee into Sweden and in the exports of coffee from Sweden since the beginning of the war. This showed changes both in quantity and in destination, and also an increase in the appellants' imports.

<sup>1</sup> The *Times* Law Reports, Vol. 35, p. 74.

There was also evidence that if the ulterior destination of this coffee was Germany it would be imported into Germany for the use of the German Government and forces. No evidence was put in to contradict that of the Crown.

The appellants, whose declaration before shipment had stated that the coffee was intended for internal consumption in Sweden, made it part of their case that they were considerable exporters of coffee to Finland, as well as dealers in coffee in the Swedish province of Norrland, and in support of this they vouched two certificates, signing respectively as "British Pro-Consul" and as "Acting British Pro-Consul," at Sundsvall, purporting to give the result of an examination of the appellants' sale notes and books. The learned President, justly impressed with the unquestioned fact that the appellants had multiplied their imports of coffee at least six times over since the war began, that the town in which they traded, with only 17,000 inhabitants, contained a score of other coffee importers, five of whom alone imported over 70,000 bags, while the appellants were importing 30,000 and that the two provinces of Jemtland and Vesternorrland, whose "commercial centre," Sundsvall, only contains 375,000 inhabitants, thought that the nature of the appellants' export trade required further evidence. The bags are 60 kilog. bags and an import of a quantity into Sundsvall sufficient to supply every man, woman and child within its internal trading area with a third of a hundredweight of coffee for the year suggested a large export trade, nor was the proximity of Sundsvall to Finland inconsistent with that town's partaking in the extensive and lucrative trade with Germany which undoubtedly went on. Accordingly he offered to adjourn the hearing that the claimants might have the opportunity of sending over for examination in court the books relating to their export trade, some entries in which had been submitted to the inspection of the British Vice-Consulate at Sundsvall. Their counsel accepted the adjournment in order that his clients might consider what course they should take, but on consideration they refused to avail themselves of the opportunity. Thereupon the learned President condemned the coffee, concluding his judgment with these words:

They have failed to satisfy me of the truth of their case. From the evidence adduced and from all the circumstances of the case including the conduct of the claimants, I draw the inference that the coffee seized was not bought by them for consumption in Sweden or in order to become part of the common



stock of that country or for the purpose of resale to any neutral country, but was shipped to and received by them to be forwarded through Sundsvall to Hamburg.

Three questions have been raised before their Lordships: (1) Whether this was a finding that the appellants were not really the consignees of the coffee, but only figured as such fictitiously, in order to disguise the importation of the coffee into Germany by a Hamburg firm *via* Sundsvall; (2) whether, if so, or if it was a finding that the appellants were the true consignees importing the coffee with an ulterior destination in Germany beyond Sundsvall, it was competent to the learned President so to find on the materials before him; and (3) if the finding was to the latter effect, whether it was material or warranted the condemnation of the goods in view of the destination of the ship, the tenor of the ship's papers, and the language of the Declaration of London, No. 2, Order in Council, dated October 29, 1914.

Their Lordships are of opinion that the learned President did not find that the claimants were only colorable and sham consignees of this coffee. There are circumstances in the case suggesting such a conclusion, connected with the banking transactions by means of which payment was made for the coffee, and with the part played in it by Nordskog and Co., of Rio de Janeiro, and Santos in Brazil, and of one-third Readhusgatan, Christiania, by Carl B. Prösch, also of Christiania, and by Eugen Urban and Co., coffee importers of Hamburg. There are also observations made during the hearing and passages in the judgment of the learned President, which seem to refer to such a suggested conclusion, but their Lordships are satisfied that this was not the case presented by the Crown in the Prize Court, and they think that this was not the finding at which he arrived. Even if the materials would have warranted such a conclusion, as to which no opinion need be expressed, their Lordships would not be prepared to allow the captors to succeed on appeal by raising a case on the facts, which they never presented for the determination of the court below. Their Lordships are of opinion that the materials before him warranted the learned President in finding the ulterior German destination, which they conceive to be the true effect of his judgment. The admissibility of what is called a statistical case has already been recognized.

Not only was this case pointed to the general contrast between the overseas trade of Swedish merchants before and after the outbreak

of war, but particular and precise evidence was given of the remarkable expansion of the appellants' own operations; and this was reinforced by evidence of their credit and associations. Their Lordships do not say that less might not have sufficed; the question is one of the evidence actually given. There is further the fact that the appellants declined to produce their books in court. Here again, be it observed, the President did not order them to embark on an inquiry, which they had not opened, or order that proof of a particular branch of the case should be given in one way only. The appellants had vouched in their own favor on one aspect of the case their own record of certain selected transactions; they had the opportunity of completing that aspect of the case from materials of the same class in their own possession by way of rebuttal of the captors' evidence, and to make that opportunity fruitful were informed how best, in view of the President's great experience of these cases, they could present such evidence so as to bring conviction to his mind. It is nothing to the point to urge that they had engaged in a trade, which to them was lawful though pursued at their peril, or to say, as they did say, that their trading books were required in Sweden, and that Swedish law placed a limit on the extent to which they could give "discovery throwing light upon our case." They claimed the coffee in the Prize Court, and if the evidence by which their case might have been cogently supported was required for their other business in Sweden, it was for them to choose whether they would conduct their case or their business to the better advantage. Their Lordships fully appreciate the learned President's view, that an offer of inspection of the books in Sweden "by a notary public or otherwise" was in the circumstances almost illusory.

As to the reference to the law of Sweden, the matter has been dealt with in other cases. Though loth to credit that Swedish law, truly understood, does restrict the right of a Swedish subject to support a case, which he is concerned to prove, by the best evidence of his own transactions, and while recognizing that, if it be so, this is not a matter for their criticism or animadversion, but solely one for the judgment of the Government and Legislature of Sweden, their Lordships must observe that it is impossible for a court of prize, an international tribunal, to allow its investigation of the truth of the matters brought before it to be limited by the restrictions of the municipal law affecting one of the parties to the proceedings before it. Their Lordships cannot hold that a captor's evidence is not to prove whatever it

is capable of proving merely because the claimant is not permitted by the laws of his country to produce the evidence appropriate to rebut it.

The remaining question turns upon the construction of paragraph 1 (iii) of the Declaration of London, No. 2, Order in Council. This Order, which declares under what modifications his Majesty will recognize Article 35 of the Declaration of London, so long as the Order is in force, operates as a waiver of the belligerent rights of the Crown in favor of neutrals, to which a court of prize will give effect as against captors. His Majesty, who was pleased to announce such a waiver, is entitled to modify or to recall it, as he may be advised, and in fact the Order in Council of July 7, 1916, did in terms revoke the Order in Council of October 29, 1914, and proceeded to deal with the same matters otherwise. It was, however, argued by the Solicitor-General that there had been a prior restriction or revocation of that waiver, namely, by the Order in Council of the 11th March, 1915, and the date of the shipment of the coffee and voyage of the *Kronprinzessin Victoria* was in fact such that the latter Order would cover that period, though the Order of July 7, 1916, would not. The argument shortly was that, the object of the Order in Council of March 11, 1915, being, in the words of the recital, "to prevent commodities of any kind from reaching or leaving Germany," and the substantive provision of paragraph 1 (iii) being that goods with an enemy destination carried in a ship bound for a port other than a German port shall be discharged in a British or allied port, and subsequently be restored on terms, "unless they are contraband of war," it would be unreasonable to hold that, if they are contraband of war, they may be released unconditionally, for that would expressly defeat the object of the Order in Council itself. Hence, it was said that, to avoid so unsatisfactory a result, the Order in Council of 1915 must be deemed to have revoked by implication the concessions made under the Order in Council of October 29, 1914. The point is novel. It might have been taken, but was not, in *The Louisiana* (34 *The Times L. R.*, 222; [1918] A. C., 461). The contrary was assumed to be the case, though it is true there had been no argument by their Lordships' Board in *The Proton* (34 *The Times L. R.*, 309; [1918] A. C., 578, p. 580). It was not taken by the Crown before the learned President in the present case, nor is a contention plausible which involves the proposition that an order directing goods to be restored, "unless they are contraband," is an order condemning them if they are, all other

and alleged that the consignees named in the bills of lading were so named for convenience only and that no property passed to them. Here the claimants are the named consignees and, upon the case made in the Prize Court, they were consignees to whom the property had passed before seizure—in fact, the day before. Not only so, but they were consignees to whom the consignors had parted with the real control of the goods. Their intention, however, was to give the goods an ulterior enemy destination. Does this intention prevent them from being persons the insertion of whose names in the bill of lading causes the ship's papers to "show who is the consignee of the goods"? On principle their Lordships think not. If the seizure had been two days earlier and the claims had been made by Nordskog and Co., the language employed in *The Louisiana* (*supra*) would have applied. The present is a different case, and whether the date of the passing of the property be or be not crucial, it cannot be said on the present facts that the appellants were not the consignees. It is not even shown that they had an arrangement with Nordskog and Co. or with some other parties under which they had engaged to forward the coffee to Germany, though what difference that would have made, being a personal obligation only, need not be decided. All that is shown is that they had an intention. This appears to be precisely the case, or one of the cases, in which under the Order in Council in question, the ship's destination and the form of the ship's papers covered the goods. To extend the qualities which may be predicated of the consignee, whom the ship's papers are to show, to qualities connected with his general trade or with particular contracts, independent of the contract of carriage, would be to protect the goods only when the ship's papers show something which in maritime practice they never do and rarely could show. The coffee was accordingly in this case immune from condemnation, its ulterior enemy destination notwithstanding.

The Order in Council of March 11, 1915, Article 3, provided for the discharge of the goods in the present case, and proceeded:

Any goods so discharged in a British port shall be placed in the custody of the marshal of the prize court, and unless they are contraband of war shall, if not requisitioned for the use of his Majesty, be restored by order of the court upon such terms as the court may in the circumstances deem to be just.

These words determine the mode in which these goods are to be dealt with after having been placed in the custody of the marshal. It

is for the President in his discretion to decide on what terms they shall be restored. Presumably they have been requisitioned or sold, and are no longer in specie; if so, the proceeds or their money value will represent the goods and be the subject of his order. The decree of condemnation must be set aside and the case must be remitted to the Prize Court, to settle the terms of restoration, but as the point on which the appeal succeeds is one which was never properly urged upon Sir Samuel Evans, there can be no costs of this appeal. Their Lordships will humbly advise his Majesty accordingly.

THE HELLIG OLAF (CARGO EX).<sup>1</sup>

*Judicial Committee of the Privy Council.*

December 3, 1918.

This was an appeal from a decree of the President of the Prize Court (Sir Samuel Evans) made on February 23, 1917.

Mr. R. H. Balloch and Mr. C. T. Le Quesne appeared for the appellants; the Attorney-General and Mr. R. A. Wright, K. C., for the Crown.

LORD PARMOOR, in delivering the judgment of the Board, said: The appellants, the Vendryssel Packing Company, are a Danish company carrying on business at Copenhagen in fresh and pickled salmon. They have branches in America, which, in the ordinary course of business, buy the salmon direct from the fisheries. It is only in exceptional cases that they buy from other firms. The salmon is sent to New York and shipped thence to Copenhagen, for sale mainly in Denmark, but also in other countries, including Germany. In Germany the sales were generally, though not entirely, made through branches of the appellants' firm in Berlin and Schlutup, near Lübeck. The branch in Berlin was established in 1907. The last lot of salmon, comprising eight barrels, was sent to Berlin on January 19, 1916. The branch at Schlutup, near Lübeck, was established in 1909. The last lot of salmon, comprising eight barrels, was sent to Schlutup on the 19th December, 1915. The appellants on December 22, 1915, wired

<sup>1</sup> The *Times* Law Reports, Vol. 35, p. 127.

to Hansen, their representative at Seattle, to ship a carload of Columbia River salmon, and, on January 8, 1916, sent a further message, to ask whether the salmon had been shipped. On January 21, 1916, they sent a wireless message in the name of Rollo Export Company to Tyee Fisheries, asking whether the Columbia River and Alaska salmon had been shipped, and received a reply that it had been shipped by steamer on February 3. It is clear, therefore, that, when the first message was sent in reference to the shipment of the salmon in question, the last lot of salmon had only two days previously been sent to Schlutup, and that the last lot of salmon was not sent to Berlin until nearly a month later.

A consignment of 52 tierces of pickled salmon for refrigerator was shipped on the *S. S. Hellig Olaf*, to be carried under the terms of a bill of lading dated February 4, 1916. The appellants were the shippers and consignors, and the goods were to be delivered at Copenhagen to the appellants or their assigns. Under the terms, therefore, of the bill of lading there was no consignee as distinct from the consignors, the control of the goods remained at the disposal of the shippers and consignors, and there was no independent outside interest in any other party. In effect the bill of lading left the disposal of the goods at the order of the consignors, and the ultimate destination in their discretion. At the time of shipment the tierces of salmon had not been declared as goods for neutral consumption, and no guarantee had been obtained from the Danish Merchant Guild.

The *S. S. Hellig Olaf* called at Kirkwall on or about February 15, 1916, when the tierces of salmon were ordered to be detained, but allowed to proceed upon an undertaking given to H. M. Government to store the goods in Copenhagen until the close of the present war, or to return them to England for the purpose of prize proceedings. It was not until they had become aware that the seizure had been made that the appellants obtained a guarantee in the usual form from the Merchants' Guild of Copenhagen. A correspondence followed between the appellants and the British Legation at Copenhagen and the British Foreign Office, and, finally, on November 25, 1916, the sum of £2,019, representing the insured value of the tierces of salmon, was paid into the Prize Court, for the purpose of obtaining a judicial decision on the legality of the seizure. Evidence was filed on behalf of the claimants, but the respondent, the Procurator-General, filed no evidence, relying on the admissions contained in, and deductions to be

drawn from, the appellants' affidavit and documents and the correspondence between the appellants and the Procurator-General, the British Legation at Copenhagen, and the British Foreign Office. The case was heard by the learned President, who, on February 23, 1917, pronounced the tierces of salmon to be contraband of war liable to confiscation, and he condemned the same for the sum of £2,019 then in Court. It was argued on behalf of the appellants that it was not competent for the Prize Court to condemn the sum of £2,019 in place of the condemnation of the goods themselves. Their Lordships are of opinion that, having regard to the terms of the agreement made on November 25, 1916, namely, that the sum of £2,019 should be disposed of in accordance with the order of the Prize Court, this objection cannot be maintained.

The main argument urged on behalf of the appellants was that the doctrine of continuous voyage did not apply, and that the shipment of salmon was not within the terms of the modification contained in para. 1 (iii) of the Declaration of London Order in Council No. 2, 1914. This modification provides that: "Notwithstanding the provisions of Article 35 of the said Declaration, conditional contraband shall be liable to capture on board a vessel bound for a neutral port if the goods are consigned to order, or if the ship's papers do not show who is the consignee of the goods, or if they show a consignee of the goods in territory belonging to or occupied by the enemy." The construction of this modification was considered in the case of *The Louisiana* (34 *The Times* L. R. 222; [1918] A. C., 461), and the judgment of their Lordships covers the present case. The question arose, in that case, whether the ship's papers show who is the consignee of the goods, if the shipper retains control, and can alter the destination of the goods according to his interest, and at his own discretion. It was pointed out that under these conditions the shipper would retain as full control of the goods as if the consignment had been to order, and that conditional contraband could be supplied to the enemy Government, through neutral ports, as freely as if Article 35 of the Declaration of London had been adopted without modification. The judgment proceeds: "In their Lordships' opinion the words 'the consignee of the goods,' must mean some person other than the consignor to whom the consignor parts with the real control of the goods." In the present case there is no person other than the consignor to whom the consignor parts with the real control of the goods, and it follows

that the tierces of salmon are liable to capture as conditional contraband, although on board a vessel bound for a neutral port. It is not necessary to consider the further provisions of para. 1 (iii), but their Lordships do not desire to throw any doubt on the finding of the President that the ship's papers did show a consignee of the goods in territory belonging to or occupied by the enemy. The next modification (iv) provides: "That in the cases covered by the preceding para. (iii), it shall lie upon the owners of the goods to prove that their destination was innocent." The effect of this provision is that in cases covered by para. (iii) the neutral trader has brought himself under suspicion, and that it is incumbent upon him to displace such suspicion by sufficient proof of the innocency of the destination of the goods which have been seized. The question therefore arises whether the appellants have discharged the obligation which this provision throws upon them. At the date of shipment, the tierces of salmon had not been declared as goods for neutral consumption and no guarantee had been obtained from the Danish Merchant Guild. This omission is in itself a ground for grave suspicion. Their Lordships are not satisfied that any sufficient explanation has been given consistent with the innocency of the destination of the tierces of salmon. There appears to be no valid reason why this declaration should not have been made and the guarantee given in the usual course of business. On the other hand, the appellants had undoubtedly an inducement to endeavor to import salmon which could be sent forward to Berlin or Schlutup without the risk that they would be placed on the black list. When the first message was sent to Hansen at Seattle to ship a carload of Columbia River salmon, the last lot of salmon had not been sent to Berlin, and the last lot had only been sent, a few days earlier, to Schlutup. There is no direct evidence when the branches at Berlin and Schlutup were actually closed, and the inference is that they had not been closed at the date of the shipment in the *Hellig Olaf*. At one time the appellants were placed on the black list, but subsequently removed on the explanation that the salmon sent to Germany had not been imported subject to declaration or guarantee. Their Lordships fully accept the accuracy of the explanation given by the appellants, but it shows the existence of a business under which salmon were imported for enemy destination when not subject to the restrictions which a declaration and a guarantee would impose. Under these circumstances, it was clearly the duty of the appellants to make a full



## BOOK REVIEWS

*Manual of Military Law.* War Office. London: Sweet & Maxwell. 1914. Reprinted 1916. pp. xvi, 908.

This official compilation of the laws of war was instituted by a request from the Rt. Hon. F. Stanley, Secretary of State for War, to the Parliamentary Counsel Office, to prepare rules of procedure under Section 67 of the Army Discipline Act of 1879 and also a manual containing the Act and above rules with notes, so as to form a text-book on military law. The continuance of the work was approved by subsequent Secretaries of State for War and the work was finally issued in 1884 under the authority of the Rt. Hon. the Marquis of Harlington, M. P., then Secretary of State for War. The great delay was due to the repeal of the Act of 1879 and its replacement by the Army Act of 1881.

General editorship was undertaken by Mr. G. A. R. Fitzgerald, of the Parliamentary Bar, but chapters were written by Sir Henry Thring, K. C. B., Parliamentary Counsel, and subsequently Lord Thring, by Mr. H. Jenkyns, C. B., Mr. C. P. Ilbert, Lt.-Col. Blake, R. M. L. I., and Mr. A. C. Meysey-Thompson. Free use was made of the earlier work of Major-General R. Carey, C. B., entitled "Military Law and Discipline," and also of the late Captain T. F. Simmons' book on the "Constitution and Practice of Courts-Martial." The work was further revised by the Rt. Hon. G. O. Morgan, Q. C., M. P., Judge Advocate General.

A second and revised edition appeared in 1887 and, new rules and statutes requiring it, they were incorporated and a third revised edition issued in 1894.

The Criminal Evidence Act of 1898, being applicable to courts-martial, a new edition was required and appeared, incorporating such Act, in 1899, under the editorship of Mr. F. F. Liddell, with assistance from Sir John Scott, Sir Henry Jenkyns and several eminent hands.

The fifth edition appeared in 1907, edited by Mr. Graham-Harrison, having been made necessary by amendments to the Army Act

and the reorganization of the system of commands and of the War Office.

The present and sixth edition appeared in 1914, edited by Hon. Hugh Godley.

Its points of advance are (1) : A new chapter (Chapter XIV) on the laws and usages of war on land, by Col. J. E. Edmunds, C. B., and Mr. L. Oppenheim, LL.D. The latter has held for years, in succession to Dr. Westlake, the Whewell Professorship in International Law at Cambridge University, and has maintained the high traditions of his chair. (2) Chapter XL has been largely rewritten and other portions revised, because of the reorganization of the Army in 1908, and later Acts, like the Official Secrets Act of 1911, have been included. (3) The War Office has revised the index.

The above brief history of this valuable and authoritative, but necessarily technical and extended, work, is almost all that can be given concerning it. Statutes and rules and many forms are included.

The chapter by Colonel Edwards and Professor Oppenheim was published by His Majesty's Stationery Office as a separate small volume, entitled "Land Warfare," as early as 1913.

Considering the deep interest felt in the United States in the investigation and attempted reform of courts-martial, it may be mentioned that in the index of this Manual that topic covers between five and six pages of fine print and the work affords a mine of official information as to the British law and practice.

Attention is also called to Chapter VII, entitled "Offences Punishable by Ordinary Law," which gives a wonderfully clear and adequate, but condensed, statement of the general criminal law. A student reading for an examination could not find a more useful and compendious text.

CHARLES NOBLE GREGORY.

*Neutrality Versus Justice, An Essay on International Relations.* By A. J. Jacobs. London: T. Fisher Unwin. 1917. pp. 128. 2 s. net.

The author of this little essay undertakes to establish the following theses: (1) that the time-honored policy of neutrality, hitherto sacred to militarists and pacifists alike, is utterly incompatible with inter-

national justice or permanent international peace; (2) that the principle of mutual protection, which is the basis of civil society and the starting-point from which every system of law has been developed, affords the only true basis for international peace; (3) that the same impulse which has driven nations of dissimilar culture and ideals to enter into defensive alliances that have almost imperceptibly grown into two great international groups, will also force them to take a further step in the same direction, and merge these groups into one combination for mutual defence; and (4) that an international alliance for territorial defence must be the starting-point of a real system of international law.

Mr. Jacobs believes that disarmament can be accomplished, not by agreement, but only by guarantees against territorial aggression and the gradual growth of a feeling of security. He does not believe that the cause of international peace would be greatly advanced by the establishment of an international court of justice, because he does not believe that nations would willingly submit to its decisions, but he believes that a real system of law and a court would inevitably evolve from the conditions established by the adoption of the principle of mutual protection and the formation of a general alliance for territorial defence.

As to the objection that a general defensive alliance would stereotype international conditions, he says that the prohibition of the use of force has not done so among individuals. The nation which wants more commodious quarters must, he contends, like the individual, pay the rental or purchase price. "The cost of a war of conquest would probably yield a far better return if utilized for the peaceable acquisition and development of territory, or to secure trading and industrial opportunities for its growing population." Here, as elsewhere in the volume, he pushes the analogy between nations and individuals too far.

A general defensive alliance, he contends, presents far fewer objections and dangers than a special alliance, for the members of a special alliance are usually faced in any conflict by a combination of similar strength, and the chances of victory or defeat are more or less evenly balanced, whereas a general agreement for mutual defence would always bring "an overwhelming margin of force against the would-be aggressor." As to the danger of a general defensive alliance being undermined sooner or later by internal intrigue, he

points out that "at least one-half the world must first betray and then be prepared to fight the other half."

Mr. Jacobs lays almost exclusive stress on territorial aggression as the cause of wars. As economic and commercial rivalries have been primarily responsible for many modern wars, the mere guarantee of territorial integrity will not put an end to war. The covenant of the League of Nations recognizes this fact in the powers conferred on the Council. On the whole, however, Mr. Jacobs' essay constitutes a valuable argument for the League, especially for Article X, while it offers some reasons for the postponement for future consideration of such questions as disarmament, the establishment of an international court of justice, and the revision of international law.

JOHN H. LATANÉ.

*Foreign Financial Control in China.* By T. W. Overlach. New York: Macmillan. 1919. pp. xiii, 295. \$2.00.

In this day of international rivalries and world stress, publishers often overreach themselves in their feverish search for new material and sensational products. While writers, without adequate training in special fields or literary experience, rush into print to help on some phase or other of world development. In the volume before us, the author attempts to "give a comparative and scientific account of—the most tangible and concrete problem of the otherwise so elusive Far Eastern Question, namely, the problem of 'Foreign Financial Control in China'." Feeling that "a clearer vision in international affairs" and a candid examination of the whole situation by "each nation with unprejudiced mind," are necessary to the solution of the Far Eastern Question, he proposes to "adopt a sympathetic view and attitude toward all the Powers concerned, trying to give justice to each, instead of seeing things through the colored glasses of national ambitions." His work is prefaced by a theoretical introduction in which the writer defines the political and economic terms now in vogue within diplomatic circles in the Far East, and an historical introduction containing the history of Foreign Relations with China before 1895. The latter is compiled almost entirely from Sargent's *Anglo-Chinese Commerce and Diplomacy* and Morse's *The International Relations of the Chinese Empire*. The book contains chapters

on the relations of China with Great Britain, Russia, France, Germany, Japan and the United States; and it concludes with a chapter on "International Control" and another entitled "Conclusion." The former is misleading, for while it deals with some of the attempts at international co-operation, it falls short of being an intimate or comprehensive study of the vital problem of international control. And the latter is a brief summary of some results of foreign pressure on China and of general statements concerning the need of international co-operation.

The author has an uninteresting and prosy style. He intersperses his text with long and wearisome quotations; and he presupposes on the part of his readers an intimate knowledge of recent Chinese diplomatic history. These drawbacks, in an otherwise attractive volume, are sufficient to prevent the work from appealing to the general reader. And it will be equally disappointing to the student and the expert, since it contains little new material and falls short of being a broad, masterly treatment of the subject in hand. In some chapters, such as those on "Great Britain," "Russia," and "Japan," the writer has given a fairly complete account of the topic under discussion; but those on "France," "Germany," "United States," and "International Control" are inadequate, both in their conception and in their treatment of the problems involved. There is a bibliography, an index, and an outline of the contents of each chapter, all of which add to the usefulness of the book. But the great lack which the reader feels throughout the volume is a map of China, or better, a series of sketch maps, that would show the location and extent of the various railway and financial concessions described, or referred to, in each chapter.

The idea of the author in defining terms and phrases in his "Theoretical Introduction" is excellent; but it would have been more satisfactory if he had carried out his plan consistently. He fails, however, to make clear the "Open Door" policy; and, on the question of "concessions," he confines his discussion to railway concessions, avoiding any reference to economic and territorial concessions. While on the topic of "control," he does not explain the different degrees and kinds of political control. This inconsistency is undoubtedly due to the vital error of supposing that one can write intelligently on one phase of a great Oriental question without keeping its connection with the rest of the problem constantly in mind and without

making this connection perfectly clear to one's readers. The relationship of the problem of Foreign Financial Control in China to the whole situation—financial, economic and political—in that vast Republic today, should have been explained in some detail—at least in the Introduction.

One cannot but feel that the author has undertaken an unnecessary and thankless task in attempting to produce a volume dealing only with the financial and railway policy of foreign states in China, without making a study of the political policies of these states. There are excellent works already on the railroads of China; and there are other books that cover the financial history as well as he does, for, unfortunately, his narrative stops in 1913 and it does not give the intimate history of the Six Power Loan or of later loans.

Moreover, the writer is led inevitably into blunders, whenever he steps outside the narrow field of his chosen research. For instance, he speaks of the Ishii-Lansing Treaty in high terms as "removing all danger of friction between the United States and Japan" (p. 194), and as securing "the independence and territorial integrity of China and the 'Open Door,' for commerce and industry." But it is well known that this agreement was so skillfully yet loosely drawn, that it confirmed Japan in her holdings and rights in Manchuria and North China, while affording American interests no more protection than already existed and furnishing no guarantee against further aggression on the part of Japan. And no mention was made of the racial discrimination in our immigration laws—one of the sources of friction between the two countries; while the transfer of Shantung to Japan in the recent peace treaty shows that the high-sounding phrases of the Ishii agreement concerning the integrity of China meant nothing to the rulers of the Japanese Empire.

Again, without any explanation of the work and policy of Japan in the Far East, the author suddenly claims that: "All treaties, conventions, agreements, and alliances through which Japan is consolidating her position are concluded for the consolidation and maintenance of a permanent peace in eastern Asia. This is the key to the whole Far Eastern Question: A Permanent Peace but a Japanese Peace (p. 194)." This sounds well; but there is a selfish, sinister side to this program, which is apparent only to those who know the real meaning of the term, "Japanese Peace." Unfortunately, while the present party controls the destiny of the Empire of the Rising

Sun, this will mean nothing more than a peaceful situation where Japan gets everything she wants in the trade and development of the East, and the rest of the world the fragments that remain, and where China will enjoy her national life and development under Japanese leading-strings.

The publisher's advertisement of this volume conveys a wrong impression of its purpose and contents. This is inexcusable, and in the long run will not help the sale of their books. "It presents," they claim, "an unbiased analysis of the financial and political activities of the six leading Powers in China during the last twenty years." But the author begins his work with the statement that he is concerned only with the financial side of recent Chinese development. And he keeps strictly to his program, except that he lays more stress on railway development than on financial or economic progress, and that he says nothing about the developments of the last six years. Again, the publishers state that the book "emphasizes the need of international co-operation." It does so in a few sentences; but one is not impressed with the case as presented. Nor does the author suggest any feasible plan by means of which this can be brought about or the Chinese Government set on its feet—financially, economically and politically. Further, the publishers state that the aim of this volume is a contribution toward international conciliation, by assisting the Powers "to readjust their specific national interests and viewpoints on the basis of mutual respect for the needs and aspirations of all, including those of China." It is doubtful if the diplomats of any state will be greatly impressed by a book that tells only part of the story and fails to give an adequate picture of the terrible plight—economic, financial and political—in which China stands today, and to prove the hopelessness of her outlook without some form of international intervention.

NORMAN DWIGHT HARRIS.

*El Perú y la Gran Guerra.* By Juan Bautista de Lavalle. Lima: Imprenta Americana, 1919. pp. xv, 439.

Students of the Great War will not overlook or underestimate the assistance to the desired end which was rendered by so many of the Latin-American nations. In the volume before us we find an ex-

cellent account of the events leading up and subsequent to the breaking off of relations between Peru and Germany. The history, fully documented, of the destruction of the *Lorton* (a Peruvian vessel), is set forth, as well as the exchange of correspondence between the representatives of Peru and of Germany with relation thereto. The work deserves, therefore, as indicated, the careful attention of the student and historian.

From another point this volume can, to advantage, be studied by those who are interested in Latin-American forms of courtesy, and who wish to submit themselves to them. Such a one will note the exchange of compliments or courtesies passing between Peru and other South, as well as Central, American countries, as well as between their cities, upon the breaking of relations and afterward upon the signing of the armistice. The emphasis placed upon the exchange of courtesies on these occasions between the various members of the diplomatic corps and the public officials of Lima will not be unnoticed. All of these matters suggest an attitude of mind with which we are relatively unfamiliar, but which is to be penetrated and understood if we are to meet our friends of the South upon their own ground.

JACKSON H. RALSTON.

*Mein Kriegs-Tagebuch.* Vol. I. *Das erste Kriegsjahr.* By Alfred H. Fried. Zurich: Max Rascher Verlag. 1918. pp. xxiv, 472.

The author informs us that in August, 1914, he was in the midst of the preparatory labors for the Twenty-First World Peace Congress, which was to have convened in his home city, Vienna, one month later. The outbreak of war was to him, as to so many others, a bolt out of a clear sky. Although long familiar with the conditions making a European conflagration imminent, he could not bring himself to a belief in the actuality. He thus found himself unfit for other work and sought solace in this diary of his daily impressions.

The present volume takes us only through the first year of the war. The author recalls the warnings published in prior years in his peace organ, the *Friedens-Warte*, and frankly admits that he over-rated the elements making for peace. His first analysis of causes leads him to the question of Alsace-Lorraine, and he even ventures a possible solution. He had long maintained that a good understanding



between France and Germany was the key to peace in Europe. Later, when the exchange of correspondence between the capitals of Europe begins to appear in the daily press, he alters his opinions on the causes of the war and reaches the conclusion that the Central Empires saw a favorable moment for establishing a technical superiority in arms and at the same time found the Russian military party only too willing to play the game. While these premises are reasonable enough, we fail to understand how they lead him to the conclusion that it is thus a "preventive war."

Even in the first month, he correctly foresees the intervention of the United States if the war is to continue for any great length of time. He never gives up the hope of a settlement through American mediation, and proposes to the late Edwin Mead, whom he sees in Leipsic, that the nations of North and South America should jointly offer mediation through the instrumentality of the Pan-American Union.

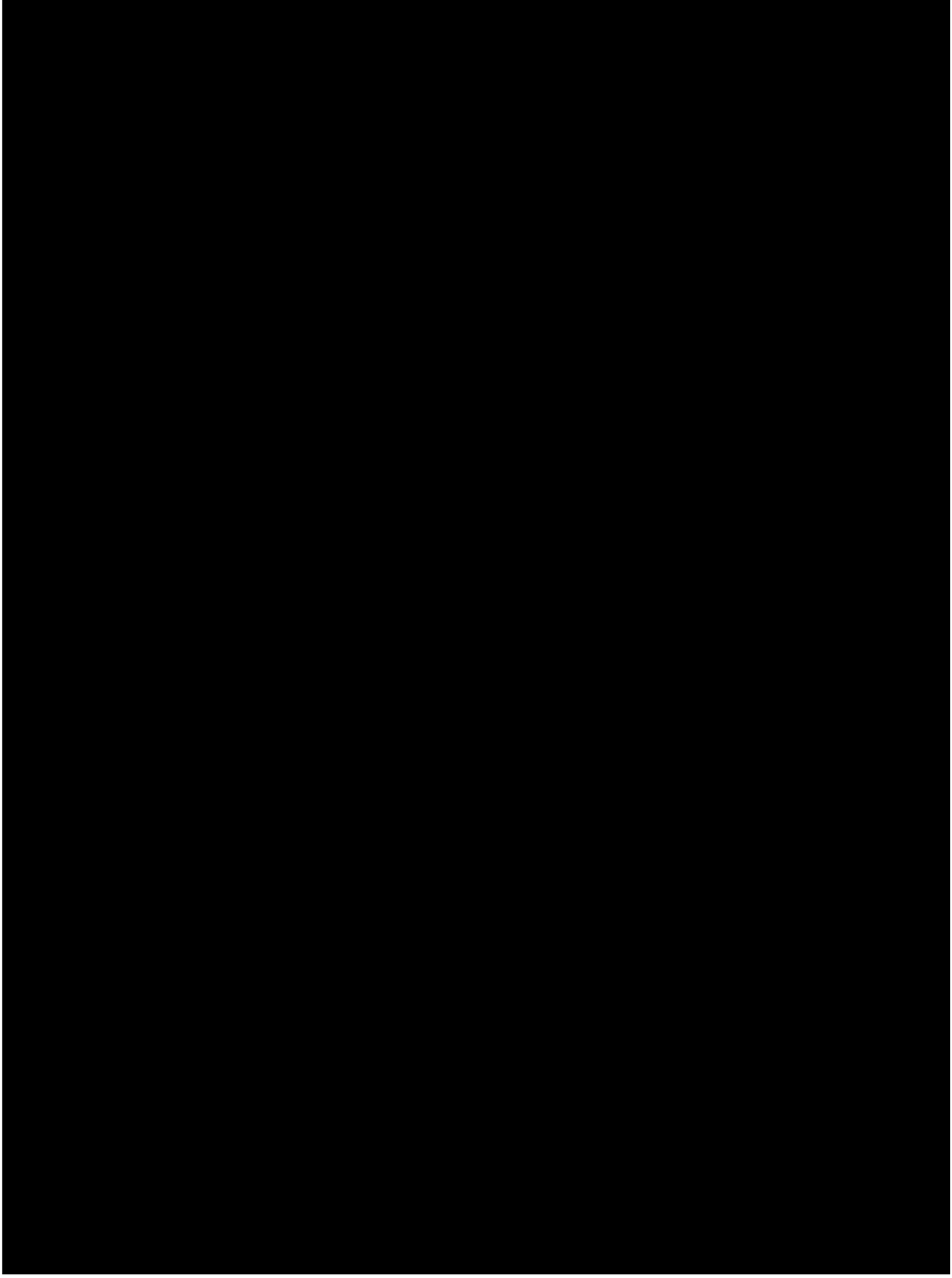
Although parts of the diary seem to have been published in Berlin shortly after they were written, he adopts from the beginning a distinctly critical tone in discussing the attempted justifications of the German and Austrian press. He does not hesitate to point out crucial omissions in the documentary evidence produced relating to Belgium. He condemns unqualifiedly the sinking of the *Lusitania*. On the other hand, he criticizes, upon legal and moral grounds, the assumption by Great Britain of the right to treat captured submarine crews other than as prisoners of war.

By the Spring of 1915, after removing to Switzerland, he has become convinced of the utter hypocrisy of the governments of the Central Powers. The results of his observations lead him to advocate the elimination of the traditions of feudalism in international relations, the democratization of government, "the internationalization of disputes," and such changes in the policies of all states as shall harmonize with the needs of international organization.

The material with which he deals is often journalistic, yet he maintains a philosophic point of view. No one will fail to respect the author's impartiality, nor his reverent yearning for the coming of a better day. He is truly a Jeremiah, lamenting the false ideals by which his people have been led to their doom.

ARTHUR K. KUHN.

*The Conflict of Laws Relating to Bills and Notes.* By Ernest H.



congratulated on a constructive bit of work which should be of distinct value in helping us to reach sound conclusions upon many of the problems he has discussed.

RALEIGH C. MINOR.

*War Book of the University of Wisconsin.* By Members of the Faculty. Madison: University of Wisconsin. 1918. pp. 266. Price, 50 cents.

During the academic year 1917-18 the faculty of the University of Wisconsin prepared a series of articles on the war which were published separately by the University and widely circulated. These articles did much at the time to unite public opinion in Wisconsin and elsewhere in support of the war; and as there has been a continued demand since their first publication, a committee of the faculty has collected the original issues and arranged them in a single volume. In its present form the book traces the steps by which the United States was transformed in less than three years from a peaceful nation to a democracy in arms fighting for its very existence. It is divided into five parts, dealing with the following questions: (1) responsibility for the war; (2) Germany's methods of warfare; (3) the nature and causes of the German militaristic spirit; (4) America's entrance into the war, and finally (5) the fundamental issues of the war.

Since the original articles were published as war pamphlets to influence public opinion in favor of the war, the book in its present form should be judged in the light of its original purpose. The reader, therefore, will regard it not as a presentation of both sides of a great issue, but rather as the plea of advocates who justly felt that their own countrymen had been deceived by foreign propagandists and were not fully alive to the real issues involved. This does not mean that the chapters comprising the volume are not, in general, presented in a fair, painstaking and critical spirit. In fact, the great majority of the papers bear evidence of careful study, a comprehensive grasp of the issues raised, and they are generally well written. As war documents go, it would be difficult to find a clearer or juster statement of our cause. But, as with all war publications, its value is limited by its purpose; and since that purpose is to state the case

against Germany, we need not be surprised to find an occasional slip which blurs the facts or at least fails to present a complete statement of the case. For example, on page 20, we read, "In her White Book Germany states positively that she assured Austria that any action which that country might consider it necessary to take toward Serbia would meet her approval." This needs qualification. What Germany, according to the document mentioned, actually did say was that she would support Austria in "any action she (Austria) considered necessary to put an end to the movement in Serbia directed against the integrity of the monarchy." Germany claimed "to be guided in her action only by her duties as an ally."

Again, on page 173, discussing Treitschke's political theories, we read, "Have they (States) any moral obligations to each other? Treitschke answers distinctively in the negative." It would be interesting to know where Treitschke makes any such statement. No reference is given, but no one can read his "Politics" and come to any such conclusion. It would be difficult to find a modern writer on politics who preaches morality within a state and between states more insistently. He is indeed the apostle of force and power, but he does not advocate the Machiavellian theory of power as the author assumes. In the last chapter of his "Politics" he specifically denies Machiavelli's view of the state: "A state which went upon the theory of despising faith and loyalty would be constantly threatened by enemies and would consequently be unable to fulfil its purpose of being physical power." While agreeing with Machiavelli that the state is power, Treitschke does not fail to note "the deep immorality of much else in his political teaching." The following quotations are taken from Balfour's edition of Treitschke and fairly represent Treitschke's views on this point: "It is at once clear that as a great institution for the education of the human race, the state must necessarily be subject to the moral law" (1:89). "We must then admit the validity of the moral law in relation to the state and that it cannot be correct to speak absolutely of collisions between the two" (1:92). "Thus the state cannot disregard with impunity the law to which its moral being is subject" (1:98). "Wisdom is not merely an intellectual, but a moral virtue in the statesman who is responsible for the fate of millions" (1:98).

I call attention to these facts, not so much to criticise the value of the volume under review, for it is comparatively free from such

errors, but rather in the hope that American scholarship, now that the peace treaty has been signed, may resume its discussion of political theories in a more critical spirit. Political theories of the state should not be confused with actual government, or with practices of rulers during a war.

KARL F. GEISER.

*League of Nations.* By L. Oppenheim, M.A., LL.D. London: Longmans, Green & Co., 1919, pp. xii, 84.

Pursuant to the injunction which Dr. Whewell, the founder of the Chair of International Law at Cambridge University, England, laid upon every holder of the Chair that he "make it his aim" in all parts of his treatment of the subject, "to lay down such rules and suggest such measures as may tend to diminish the evils of war and finally to extinguish war between nations," Dr. Oppenheim, the present occupant of the Chair, delivered during the course of the War, three lectures at the University on a League of Nations. This book comprises the three lectures thus delivered.

Dr. Oppenheim confines these lectures to drawing attention to the links which connect the proposal for a league of nations with the past, and to the difficulties with which the realization of the proposal must necessarily be attended, and to some schemes by which these difficulties might be overcome.

He briefly touches upon the early attempts to form a league of nations, calling attention to the proposal of Pierre Dubois in 1305 for an alliance between all Christian Powers for the maintenance of peace and for the establishment of a permanent court of arbitration for the settlement of differences between the members of the alliance; and to the schemes of Martini in 1461, Sully in 1603, Cruceæ in 1623 and Grotius in 1625. He also reviews the progress made in our time in this direction by the Hague Peace Conference and the so-called Bryan Peace Treaties. He emphatically states that the organization of a League of Nations should start from the beginning made by the Hague Peace Conferences.

The aims of the League of Nations, in his opinion, should be confined to preventing the resort to war on account of so-called judicial disputes, by having these disputes submitted to an international

court of justice; to preventing the sudden outbreak of war on account of political disputes by providing for the submission of such disputes to an international council of conciliation before resorting to arms; and to providing a sanction for the enforcement of these safeguards by uniting the forces of the member states against a state or states resorting to arms without previously having submitted the dispute to an international court, or international council of conciliation.

To realize these aims for the league he considers that the organization of the league should comprise an international legislature, an international court, and international councils of conciliation.

With regard to the international legislature (using the word "legislature" in a figurative sense only), Dr. Oppenheim proposes to start from the beginning made by the Hague Conferences and have periodical meetings of these conferences for the purpose of continuing their work of gradually codifying international law.

He points out the difficulties of such international legislation on account of the language question; the conflicting national interests of the various states; the absence of universally recognized rules concerning the interpretation and construction of international legislation; and the impossibility of creating international legislation by a mere majority of the states.

The plan outlined for the creation of the international court provides for a Permanent Bench to be continuously in session, which will review the cases heard in the first instance by the judges appointed by the disputant states and one member from the Permanent Bench.

Dr. Oppenheim expresses the belief that the experiment will be successful, provided the states are careful in the appointment of the judges and select "not diplomatists, not politicians, but only men . . . who have had training in law in general, and in international law in particular."

In creating the council of conciliation to pass upon political disputes, Dr. Oppenheim proposes using the foundations laid by Article 8 of the Hague Convention Concerning the Pacific Settlement of International Disputes, and the so-called Bryan Peace Treaties. His plan provides for the creation of a Permanent Council of Conciliation, with certain specified duties, composed exclusively of representatives of the Great Powers. His proposal is to have a political dispute, which cannot be settled by diplomacy, investigated and reported upon by a council composed of two national conciliators on each side and

one neutral conciliator on each side selected by the disputant states, with a chairman selected from the Permanent Council of Conciliation, which council shall, if possible, propose a settlement. No action is provided in case a settlement is not reached by mediation, beyond having copies of the report sent to each party in dispute and to the Permanent Council of Conciliation; but Dr. Oppenheim himself explains that his proposal with reference to mediation within the League of Nations is "sketchy and would need working out in detail if one were thinking of preparing a full plan for its realization."

Dr. Oppenheim emphasizes the necessity for keeping intact the independence and equality of the several states, in order to have a successful organization of a League of Nations. He, therefore, dismisses as impossible of realization, all plans for a League of Nations which, in addition to providing for an international court and council of conciliation, also provide for a federal state organization with an international executive, parliament, and army and navy, or police force. His reasons for rejecting the ideal of a federal world state organization furnish one of the most interesting discussions in the book. Among the reasons stated for this rejection are the following:

We need democracy and constitutional Government in every single State, and this can only be realised by party Government and elections of Parliament at short intervals. The waves of party strife rise high within the several States; no sooner is one party in than the other party looks out for an opening into which a wedge can be pushed to turn the Government out. In normal times this works on the whole quite well within the borders of the several States, because the interests concerned are not so widely opposed to one another that the several parties cannot alternatively govern. But when it comes to applying the same system of Government to a Federal World State, the interests at stake are too divergent. The East and the West, the South and the North, the interests of maritime States and land-locked States, the ideals and interests of industrial and agricultural States, and many other contrasts, are too great for it to be possible to govern a Federal World State by the same institutions as a State of ordinary size and composition.

This International Army and Navy would be the most powerful instrument of force which the world has ever seen, because every attempt to resist it would be futile. And the Commander of the International Army and the Commander of the International Navy would be men holding in their hands the greatest power that can be imagined.

The old question, therefore, arises: *Quis custodiet ipsos custodes?* which I should like here to translate freely by: Who will keep in order those who are to keep the world in order? A League of Nations which can only be kept together

by a powerful International Army and Navy is a contradiction in itself; for the independence and equality of the member States of the League would soon disappear.

Dr. Oppenheim particularly warns against attempting, in the creation of a League of Nations, the realization of proposals which are "so daring and so entirely out of keeping with the historical development of International Law and the growth of the Society of Nations, that there would be great danger of the whole scheme collapsing and the whole movement coming to naught."

It is to be regretted that Dr. Oppenheim did not include in his book a draft convention for a League of Nations based upon the principles set forth in his lectures.

H. K. THOMPSON.



## SOME LEGAL QUESTIONS OF THE PEACE CONFERENCE<sup>1</sup>

I REALIZE that any subject which has to do with the Peace Conference possesses at this time a peculiar interest not only to members of the legal profession but in fact to men of every avocation and every nationality. At the same time to treat of these subjects dispassionately and without inviting the charge of undue prejudice is by no means an easy task. We are still so near the Great War and its dreadful consequences, so near the complex questions which were considered and decided by the Paris Conference, that it is practically impossible to form a true perspective of the proceedings of the Conference or to give even a relative value to the things that it accomplished.

A man, however learned he may be or however high a reputation he may have gained as a statesman or political thinker, can not speak with certainty of the future. Emphatic or intemperate utterances in favor of or against the settlements reached by the nations represented at Paris ought not to be made; and, if made, they will assuredly not receive the unqualified approval of men of broad vision and judicial mind. It is unfortunate that the difficulties and obstacles which had to be overcome or avoided by the negotiators can not be fully explained at this time. If they could be, I believe that many of the objections to the treaty would vanish or at least not be urged by those who have been vehement in their denunciation of some of its provisions. I am sure that it is ignorance or at least incomplete knowledge which has induced much of the criticism of those who are otherwise familiar with our foreign affairs. I prefer to believe this to be the cause, rather than to charge them with intellectual dishonesty or with being governed by their emotions or by motives unworthy of anyone who seeks to be just in forming an opinion.

<sup>1</sup> Address by Hon. Robert Lansing, Secretary of State of the United States, before the American Bar Association, Boston, Mass., September 5, 1919.

In discussing the legal questions, which are suggested by the Peace Conference or are directly raised by the Treaty of Peace, it is my purpose to do so as impartially as possible. Of the two classes the suggested questions rather than the definite questions presented by the provisions of the treaty are to my mind the most important. They may lack the preciseness of a formulated provision but they invite the especial consideration of those who are interested in the philosophy of law and its interpretation into a standard of international conduct.

It is manifest that this war has given an impetus to what is commonly termed Internationalism, though it would be more proper to call the communistic doctrine Mundanism. This pseudo-Internationalism seeks to make classes or in some cases individuals the units of world organization rather than nations. It is the enemy of Nationalism which is the basis of world order as we know it. It is a real, though not always an open, enemy of national independence and of national sovereignty. Its more radical adherents demand class allegiance and discourage or denounce national allegiance. In its extreme form it purposes to remove national barriers and to overthrow national governments whether democratic or monarchic in form. This is not a new communistic doctrine or theory, but it never became an actual menace to the present social order until the successful revolution in Russia fell into the hands of the Bolsheviks. Spreading from this center of unrest and disorder the movement has today assumed proportions which command the serious consideration of every civilized people. In certain lands the economic conditions and state of wretchedness resulting from the war have been peculiarly favorable to its growth. However safe this country may be from the more pernicious forms of this doctrine and however confidently we may rely upon the sound common sense of the American people, we cannot ignore the dangerous possibility that moderate forms may under certain influences develop into extreme and threaten our political institutions. We ought to realize that the world can not be organized on both Mundanism and Nationalism. The political cleavage must be between nations or between classes. We must choose between these two conceptions of world order.

I have no doubt what the final verdict will be unless thoughtful men fail in their duty. It will be for Nationalism, not the evil form of Nationalism which was the bane of the eighteenth and nineteenth centuries, but the democratic form which will develop in the present century and become the cornerstone of the new order.

I have referred to Nationalism in this connection because the Treaty of Peace by its terms and method of negotiation makes the nation the unit of responsibility and of right. The treaty is an agreement between sovereign states and imposes obligations upon nations, not upon individuals. Thus, it announces to mankind that the nationalistic idea is to be preserved as the basis of society and that nation will deal with nation as in the past.

This fact is of importance from the legal standpoint, since it shows that international law, and not world law affecting individuals, is to continue as the standard of intercourse between governments and peoples. With such an evidence of the will of mankind and with such an assurance that Nationalism will not be abandoned, we can proceed to rebuild our international system and codes upon sure foundations.

In times of peace there have been three ways of composing international controversies—namely, diplomatic settlement, mediation (an aid to diplomatic settlement), and judicial settlement. The Treaty of Versailles has not changed these three methods. They exist in the Covenant of the League of Nations which declares for arbitration, international inquiry and mutual understanding. The peaceable settlement of a controversy between nations thus falls within the sphere of legal justice or the sphere of diplomacy, since mediation or inquiry is an adjunct to an amicable arrangement between the parties to a dispute, and therefore is diplomatic in character.

The Covenant has gone far in developing a new process of diplomatic adjustment of such differences as have been heretofore the frequent causes of war between the disputants, but its only contribution to the advancement of international arbitration is to make it in a measure partially compulsory, and to provide that "plans for the establishment of a permanent Court of International Justice" should be formulated and submitted to the members of the League by the Council. It is with this latter provision that jurists should be par-

ticularly concerned for the usefulness of this instrument of settlement depends upon the proper constitution of such a tribunal and the practical method of procedure before it.

Many of us, who have had experience before international courts and commissions, have realized the inadequacy and unsatisfactory character of the present system of arbitration and the imperfect, if not objectionable, method of procedure which has been followed. Appreciating now as we did not before the evil purposes which the Powers of Central Europe had so long secretly cherished, it is remarkable that The Hague Convention of 1907 developed as far as it did a workable system for the judicial settlement of international disputes. I have no sympathy with those who criticize or condemn the accomplishment of that great assembly of distinguished statesmen and jurists who formulated an instrument and a method, by which justice could be applied to nations as national judiciaries have applied it to individuals. It is ignorance of the difficulties of their task or in some cases I fear a less justifiable reason which has induced unfavorable comment or contemptuous indifference to the real achievements of The Hague Conferences.

The creation of The Hague Court was a tremendous forward step in the prevention of international wars in that the signatories to the organic convention committed themselves to the standing policy that justice should be the controlling principle in all relations between nations and that its application to concrete cases by an impartial tribunal ought to supersede the ancient and barbarous method of trial by combat. I desire to register here my personal appreciation of the great service which was rendered by The Hague Conferences of 1899 and 1907 in furnishing the world a definite system of international judicature. Along the general lines of The Hague Convention the nations should build a new and more substantial structure, eliminating those weaknesses and undesirable features which were the consequence of the improper motives of certain Powers, particularly the German Empire, and of the false conception of their national interests. It would be folly to cast aside all that has been achieved and attempt to create something entirely different. In our desire to make this new era a better one than the one from which we

have emerged, we must not let idealism run away with common sense or assume that we possess a mentality far superior to our predecessors. Past methods are not all worthless because they failed to accomplish their objects in the extraordinary and abnormal circumstances which resulted in the World War. I do not believe that any human agency could have prevented the conflict through which we have passed so long as greed and ambition were the supreme impulses of the German Autocracy. If the German Government had not been inspired by these evil motives and had not believed that it possessed the physical power to gratify its desires, who is prepared to say that The Hague Convention of 1907 would not have furnished a sufficient instrument to settle peaceably controversies which might without it have produced international wars?

The fact is that under present conditions, even with autocracy vanquished and democracy triumphant, we have to face the same problems, though modified by a better conception of the truth and a less ruthless disregard of right. It is, I believe, a better world, but by no means a perfect world. Though less threatened by the sinister influence of national avarice, we are not free from it entirely. I do not know that the world will ever be until it is spiritually regenerated. As I see it there is only one principle for the direction of international intercourse which will under present conditions command the universal approval of nations, and that is the principle of justice, not in the general and abstract sense, but in the restricted sense of legal justice.

Justice in the broad sense is attractive to the reformer and the idealist. As a nation we ought and doubtless will be guided by it in our relations with other nations. But, when we come to formulate our foreign policies upon the belief that justice in the abstract is a dominant force in the regulation of world affairs, we are building on a foundation which, however desirable, is by no means certain. We must recognize the fact, unpalatable though it may be, that nations to-day are influenced more by selfishness than by an altruistic sentiment of justice. The time may come when the nations will change their present attitude through a realization that uniform justice in foreign as well as in domestic affairs is the highest type of

expediency, but that time has not yet come, and, if we are wise, we will not deceive ourselves by assuming that the policies of other governments are founded on unselfishness or on a constant purpose to be just even though the consequences be contrary to their immediate interests.

Yet, while abstract justice cannot be depended upon as a firm basis on which to constitute an international concord for the preservation of peace and good relations between nations, legal justice offers a common ground where the nations can meet to settle their controversies. No nation can refuse in the face of the opinion of the world to declare its unwillingness to recognize the legal rights of other nations or to submit to the judgment of an impartial tribunal a dispute involving the determination of such rights. The moment, however, that we go beyond the clearly defined field of legal justice we enter the field of diplomacy where national interests and ambitions are today the controlling factors of national action. Concession and compromise are the chief agents of diplomatic settlement instead of the impartial application of legal justice which is essential to a judicial settlement. Furthermore, the two modes of settlement differ in that a judicial settlement rests upon the precept that all nations, whether great or small, are equal, but in the sphere of diplomacy the inequality of nations is not only recognized but unquestionably influences the adjustment of international differences. Any change in the relative power of nations, a change which is continually taking place, makes more or less temporary diplomatic settlements, but in no way affects a judicial settlement.

However then international society may be organized politically for the future and whatever machinery may be set up to minimize the possibilities of war, I believe that the agency which may be counted upon to function with certainty is that which develops and applies legal justice. Every other agency, regardless of its form, will be found, when analyzed, to be diplomatic in character and subject to those impulses and purposes which generally affect diplomatic negotiations. With a full appreciation of the advantage to be gained for the world at large through the common consideration of a vexatious international question by a body representing all nations,

we ought not to lose sight of the fact that such consideration and the action resulting from it are essentially diplomatic in nature. It is, in brief, the transference of a dispute in a particular case from the capitals of the disputants to the place where the delegates of the nations assemble to deliberate together on matters which affect their common interests. It does not—and this we should understand—remove the question from the processes of diplomacy or prevent the influences which enter into diplomacy from affecting its consideration. Nor does it to an appreciable extent change the actual inequality which exists among nations in the matter of power and influence.

On the other hand, justice applied through the agency of an impartial tribunal clothed with an international jurisdiction eliminates the diplomatic methods of compromise and concessions and recognizes that before the law all nations are equal and equally entitled to the exercise of their rights as sovereign and independent states. In a word, international democracy exists in the sphere of legal justice and, up to the present time, in no other relation between nations.

Let us then with as little delay as possible establish an international tribunal or tribunals of justice with The Hague Court as a foundation; let us provide an easier, a cheaper, and a better procedure than now exists; and let us draft a simple and concise body of legal principles to be applied to the questions to be adjudicated. When that has been accomplished, and it ought not to be a difficult task, if the delegates of the governments charged with it are chosen for their experience and learning in the field of jurisprudence, we will, in my judgment, have done more to prevent international wars through removing their causes than can be done by any other means that has been devised or suggested.

I have but just returned from six months spent in the settling of controversies between nations through the medium of a great international conference, which followed the customs and practices of diplomacy as they will unquestionably be followed by all deliberative bodies representing the nations. I believe that I know and understand the currents and countercurrents which impelled action and

influenced decisions in that conference. It is not my purpose to review the conduct of those negotiations or to imply more than that they were diplomatic in character. But with this experience vividly in mind I cannot too strongly assert that international justice interpreted and applied by an impartial court can do more to prevent future wars than any agency, single or collective, operating in the sphere of diplomacy.

The mind of the world was never more receptive to the idea of applied justice. Mankind has endured such terrible woes from injustice and lawlessness that they seek above all things the restoration of the rule of law and justice. The governments cannot ignore this universal demand. They should not. They cannot too soon set up the machinery and let it get to work in the settlement of the controversies which continue to arouse apprehension and concern among those who seek to see a sure foundation laid for a permanent peace.

To adopt an international code of principles for the guidance of an international court of justice is, I believe, as essential as the creation of the court itself. After every great international war changes in methods and weapons have compelled a revision of the rules of warfare. The principles have not changed so much as their application to new conditions. The changes that will have to be made after this war, which for magnitude and ingenuity in the destruction of life and property surpassed all previous wars, are numerous and radical. In the past, governments have employed their armies and navies against one another as champions of their respective nations. The noncombatants of the populations have formed a class which was without military value and which was on that account free from hostile attack. But today each able-bodied individual in a state, though not serving in the armed forces of a belligerent, is a distinct asset in the prosecution of a war. The workman in the shop, the peasant in the field, the miner underground, the sailor on the merchant ship, are necessary factors in the prosecution of a war as they never were before. This Great War has been a war of peoples, and not a war of armies and navies alone. Whole nations have been mobilized in the supreme effort to vanquish their enemies. How



this manifest fact will affect the rules for the immunity and protection of noncombatants is a question which will require very careful consideration.

The introduction of the submarine, the aeroplane, and the dirigible, made possible by the invention of the internal-combustion engine, the use of the wireless telegraph and telephone, and the employment of lethal gases, of supercannon and possibly of aerial torpedoes make obsolete many rules formerly observed but now ignored.

What is to become of the rules of blockade as they existed prior to 1914? Are we to continue the farce of distinguishing between articles contraband and noncontraband? What will be the rights and duties of neutrals after the experience of the last five years? Will there be and can there be such a thing as neutrality when a war involves many nations and shatters the commercial and social order of the whole earth? These are some of the problems which will have to be solved by those who will be charged with redrafting the rules of war on land and sea.

New and puzzling questions are also presented as to the application of principles of right in times of peace. The employment of aircraft and undersea vessels in commerce and communication, the regulation of the use of wireless telegraphy, the rights as to the operation of ocean cables, and other subjects of like nature should be fully discussed before the principles of international law are put into final codified form. Then, too, there is another group of subjects as to which definite principles should be laid down in order that the present uncertainty and confusion of rights may be removed. Among these subjects are the right of expatriation and naturalization, the precise nature of business domicile, the right to retain title to ocean cables cut or diverted during a war, and others which it is needless to recite, as enough has been stated to show the importance of the task which lies before the conference charged with the codification of the principles of law applicable in time of peace and the rules of conduct in time of war.

The system of mandatories under the League of Nations as provided in the Covenant, which to the casual observer appears simple in principle and application, is a novelty in political authority which

the more it is studied from the legal standpoint the greater the number of problems which it presents.

The determination of the possession of the sovereignty over territory is essential to the determination of international rights and obligations. In the case of territory subject to a mandatory, the question therefore arises as to who possesses the sovereignty of such territory. Certainly not the mandatory which derives its authority solely from an agreement conferring upon it a limited exercise of sovereign rights. Is it then the League of Nations which possesses the full sovereignty, the exercise of which is delivered in part only to an agent or trustee? That would seem to be the logical answer, and yet consider the questions which that answer raises. Does the League of Nations possess the attributes of an independent state so that it can function as a possessor of sovereignty over territory? Is the League then a supernational world state clothed with world sovereignty? If the League possesses the sovereignty, can it avoid responsibility for the misconduct of its agent, the mandatory? If the League is not capable of possessing sovereignty, then who does possess it, who is responsible for the acts of the mandatory; and upon what ultimate authority does the League base the issuance of a mandate?

I might present a score of other questions of a similar nature which with those propounded will have to be definitely answered some time if the mandatory system comes into operation. To-day these questions are academic and may be considered technical, and no doubt by many are so considered, but it may not be long before they become concrete and very practical. It is not an overstatement to say that nine-tenths of all international controversies arise over questions pertaining to the possession of sovereignty and the conflict of sovereign rights. I do not think that mandatories and the source of their authority can escape from the test of the legality of their exercise of sovereign rights. The system must be philosophically and logically worked out from the legal point of view or it will result in confusion. I do not say this in disparagement of the system, but only as a reminder that often that which appears simple is exceedingly complex when analyzed. It is needless, however, to say this to a body of jurists whose experience has taught them that difficulties are only

too often hidden in a statute or a treaty provision, which seems at first plain and easy of enforcement. Personally, I believe that a definite legal formula can be found to bring the mandatory system into harmony with the conception of sovereignty, and the determination of international rights and obligations. But I am not prepared at this time to propound a theory to meet fully the situation, which possesses novel features, to say the least.

In addition to the variety of questions thus raised in connection with the idea of mandates, the principles governing the establishment of international servitudes will require careful study in order that they may be more clearly formulated than they have been in the past. While there have been in certain instances rights of way over territory, the rules applicable to them have not been as fully defined as in the case of the common use of international waterways and of special rights in territorial waters. The new theory of servitudes on land differs from the old, which was based on expediency and mutual advantage, in that the new depends on an assertion of right which arises from an asserted principle that a nation ought not to be against its will barred from the sea, the common property and highway of mankind, and thus deprived of the opportunity to engage in ocean-borne commerce. How far this principle should go in support of the right to free ports and land transit is a question which must be answered with due regard to the rights of territorial sovereignty and national safety.

I might expand the list of subjects for consideration suggested by the Treaty of Peace which will invite the learning and wisdom of those who will, I sincerely hope, be charged with the codification of the principles of international law. Even if I subject myself to the charge of repetition, let me say that I most earnestly advocate the formulation of such a code by an international conference of jurists and publicists. With a definite standard of legal rights sanctioned by the nations the administration of international relations as well as the administration of international justice will become more consistent and less a prey to expediency and political opportunism.

There is one other subject of a legal character of which I desire to speak because it has excited much general discussion at home

and abroad, and been the cause of some very intemperate and ill-considered expressions of opinion. I refer to the trial of the former German Emperor. I have a personal interest in that subject because it was my lot to preside over the Commission on Responsibilities constituted by resolution of the Conference on the Preliminaries of Peace and charged, among other things, with a consideration of the action which should be taken in regard to individuals responsible for the war and for violations of the laws and customs of war.

The Commission consisted of fifteen members, two named by each of the following powers: The United States, the British Empire, France, Italy and Japan, and one member each for Belgium, Greece, Poland, Roumania and Serbia. My American colleague was Dr. James Brown Scott. Sir Gordon Hewart, the Attorney-General of England, and Sir Ernest Pollock, the Solicitor-General, alternated with each other as head of the British delegation. Among the other members were the juriconsults Larnaude, of France, and Rolin-Jaequemyns, of Belgium, Mr. Politis, the Greek Minister of Foreign Affairs, and the Right Honorable W. F. Massey, the Prime Minister of New Zealand.

The Commission took up its work through the medium of three subcommissions and after two months of deliberations submitted its report, subject to certain reservations by the American and Japanese delegations which were set forth and explained in separate memoranda annexed to the report.

It was apparent at the very beginning of our sessions that certain members of the Commission were determined before everything else to bring the Kaiser to trial for a criminal offense before an international high tribunal of justice to be constituted for the purpose primarily of determining his guilt and imposing upon him a suitable penalty for his crimes. There were three charges which could be urged against him, namely, that he was responsible for the war, that he was responsible for the violation of the neutrality of Belgium and Luxemburg, and that he was chargeable with the flagrant violations of the laws and customs of war perpetrated by the armed forces of Germany.

The first two charges were the ones which appealed most strongly

to public opinion and aroused the bitterest indignation both in Europe and America. That any individual could plunge the whole world into such years of suffering resulting in the death of millions of human beings and the waste of billions of treasure, in the disorganization of society and the bankruptcy of nations, and go scot free outraged mankind's sense of justice. From everywhere arose the cry for vengeance. It was under this pressure of popular demand and handicapped by the announced purpose of certain of its members to punish the Kaiser that the Commission began its task of studying the question of his criminal responsibility. From every point of view the question was examined and the arguments for and against his trial were considered, but in the end it was unanimously decided that a report could not be made charging the Kaiser with legal criminality for beginning the war or for invading Belgium and Luxemburg. It was recognized that he had committed a great moral crime, an unpardonable offense against humanity, but the Commission was forced to find that there was no positive law declaring acts such as he had committed to be criminal and imposing a penalty on the perpetrator. The decision was reached with reluctance because of the firm conviction that the German ruler was guilty, although his guilt was not of a nature which could be declared and punished by a judicial tribunal.

The conclusions reached by the Commission read as follows:

1. The acts which brought about the war should not be charged against their authors or made the subject of proceedings before a tribunal.
2. On the special head of the breaches of the neutrality of Luxemburg and Belgium, the gravity of these outrages upon the principles of the law of nations and upon international good faith is such that they should be made the subject of a formal condemnation by the Conference.
3. On the whole case, including both the acts which brought about the war and those which accompanied its inception, particularly the violation of the neutrality of Belgium and Luxemburg, it would be right for the Peace Conference, in a matter so unprecedented, to adopt special measures and even to create a special organ in order to deal as they deserve with the authors of such acts.
4. It is desirable that for the future, penal sanctions should be provided for such grave outrages against the elementary principles of international law.

The report in this declaration emphasizes the respect of the Commission for the supremacy of law over the natural impulse to be avenged upon one who richly deserved to pay the penalty for his evil deeds.

The third charge as to "violations of the laws and customs of war" was the one on which an agreement could not be reached. The conclusion in the report is thus stated:

All persons belonging to enemy countries, however high their positions may have been, without distinction of rank, including Chiefs of States, who have been guilty of offenses against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.

By this conclusion it is evident that the Kaiser might be brought to trial before a court with criminal jurisdiction, although to establish his guilt as a violator of "the laws and customs of war or laws of humanity" would be no easy matter provided the principles of legal justice and the common rules of evidence were observed by the tribunal before which he was brought. That he should be declared innocent of the charge was by no means an impossibility, if his judges were impartial and not merely instruments of vengeance.

To this conclusion the American members of the Commission dissented, stating their position thus in their memorandum:

The American representatives are unable to agree with this conclusion, in so far as it subjects to criminal, and, therefore, to legal prosecution, persons accused of offenses against "the laws of humanity," and in so far as it subjects Chiefs of States to a degree of responsibility hitherto unknown to municipal or international law, for which no precedents are to be found in the modern practice of nations.

Omitting for the present the question of criminal liability for offenses against the laws of humanity, which will be considered in connection with the law to be administered in the national tribunals and the High Court, whose constitution is recommended by the Commission, and likewise, reserving for discussion in connection with the High Court the question of the liability of a Chief of State to criminal prosecution, a reference may properly be made in this place to the masterly and hitherto unanswered opinion of Chief Justice Marshall, in the case of the *Schooner Exchange v. McFadden and Others* (7 Cranch, 116), decided by the Supreme Court of the United

States in 1812, in which the reasons are given for the exemption of the sovereign and of the sovereign agent of a state from judicial process. This does not mean that the head of the state, whether he be called emperor, king, or chief executive, is not responsible for breaches of the law, but that he is responsible not to the judicial but to the political authority of his country. His act may and does bind his country and render it responsible for the acts which he has committed in its name and its behalf, or under cover of its authority; but he is, and it is submitted that he should be, only responsible to his country, as otherwise to hold would be to subject to foreign countries a chief executive, thus withdrawing him from the laws of his country, even its organic law, to which he owes obedience, and subordinating him to foreign jurisdictions to which neither he nor his country owes allegiance or obedience, thus denying the very conception of sovereignty.

But the law to which the head of the state is responsible is the law of his country, not the law of a foreign country or group of countries; the tribunal to which he is responsible is the tribunal of his country, not of a foreign country or group of countries; and the punishment to be inflicted is the punishment prescribed by the law in force at the time of the commission of the act, not a punishment created after the commission of the act.

. . . The American Representatives also believe that the above observations apply to liability of the head of a state for violations of positive law in the strict and legal sense of the term. They are not intended to apply to what may be called political offences and to political sanctions.

These are matters for statesmen, not for judges, and it is for them to determine whether or not the violators of the treaties guaranteeing the neutrality of Belgium and of Luxemburg should be subjected to a political sanction.

I wish to direct your attention to this last sentence because the distinction between a political sanction and a judicial sanction determines the basis of the right to impose a penalty on the head of a foreign state.

As to all individual enemies chargeable with violations of the laws and customs of war and the laws of humanity, the report recommended the creation of a high international tribunal to try such persons as were not apprehended and tried before national courts of the Allied and Associated Powers, and who were selected for trial by a prosecuting commission of five members, one being named by each of the five principal Powers.

The scheme thus proposed for the creation of a High International Court of Criminal Jurisdiction, with its complex machinery and necessity for national legislation to give it authority, to administer criminal laws enacted by various nations and also to interpret and apply the laws of humanity, was a novelty to which the American representatives refused to give full approval. Early in the discussions they submitted the following memorandum on the method which they favored for bringing to justice criminals of this sort:

1. That the military authorities, being charged with the interpretation of the laws and customs of war, possess jurisdiction to determine and punish violations thereof;

2. That the military jurisdiction for the trial of persons accused of violations of the laws and customs of war and for the punishment of persons found guilty of such offences is exercised by military tribunals;

3. That the jurisdiction of a military tribunal over a person accused of the violation of a law or custom of war is acquired when the offence is committed on the territory of the nation creating the military tribunal or when the person or property injured by the offence is of the same nationality as the military tribunal;

4. That the law and procedure to be applied and followed in determining and punishing violations of the laws and customs of war are the law and the procedure for determining and punishing such violations established by the military law of the country against which the offence is committed; and

5. That in case of acts violating the laws and customs of war involving more than one country, the military tribunals of the countries affected may be united, thus forming an international tribunal for the trial and punishment of persons charged with the commission of such offences.

In their memorandum annexed to the report, the American representatives, for the sake of reaching an agreement, conceded the possible expediency of an international commission to pass upon the military crimes affecting the nations of more than one country, because, though it was not directly in accord with their idea of mixed courts-martial, it did not contradict the principle.

The American representatives did, however, oppose the extension of the jurisdiction of such a tribunal to offences against "the laws of humanity" as was recommended in the report, first, on the ground that the submission to the Commission on Responsibilities by the



Peace Conference was limited in terms to offences against "the laws and customs of war," and, second, because the laws of humanity do not constitute a definite code with fixed penalties which can be applied through judicial process. The American Commissioners thus stated the second ground for their objection:

As pointed out by the American representatives on more than one occasion, war was and is, by its very nature, inhuman, but acts consistent with the laws and customs of war, although these acts are inhuman, are nevertheless not the object of punishment by a court of justice. A judicial tribunal only deals with existing law and only administers existing law, leaving to another forum infractions of the moral law and actions contrary to the laws and principles of humanity. A further objection lies in the fact that the laws and principles of humanity are not certain, varying with time, place, and circumstance, and according, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity.

The report of the Commission on Responsibilities, with the reservations annexed, was laid before the Conference and received the immediate consideration of the Council of Four, or, as it is often called, the Supreme Council of the Allied and Associated Governments. The decision reached by the Council is contained in Articles 227 to 230 of the Peace Treaty.

Article 227 arraigns the former German Emperor for "a supreme offence against international morality and the sanctity of treaties" and provides that a special tribunal to try him shall be constituted, composed of five judges appointed respectively by the United States, Great Britain, France, Italy and Japan. It also declares that the tribunal in its decision "will be guided by the highest motives of international policy" and shall "fix the punishment which it considers should be imposed."

Manifestly the tribunal thus created is not a court of legal justice, but rather an instrument of political power which is to consider the case from the viewpoint of high policy and to fix the penalty accordingly. And this is clearly stated in the reply of the Council to the observations of the German peace delegates on this subject. The pertinent portion of the reply reads as follows:

They (that is, the Council) wish to make it clear that the public arraignment under Article 227 framed against the German ex-Em-

peror has not a judicial character as regards its substance but only in its form. The ex-Emperor is arraigned as a matter of high international policy as the minimum of what is demanded for a supreme offence against international morality, the sanctity of treaties and the essential rules of justice.

This course of procedure was in accordance with the suggestion made in the American memorandum that there might be a political sanction but no judicial sanction for the offences of having caused the war and violated the neutrality of Belgium and Luxemburg.

Articles 228, 229, and 230 provided that persons accused of violating the laws and customs of war should be delivered up by Germany to be tried before national military tribunals of the Allied and Associated Powers, or, where the violation affected the nationals of more than one power, then before international military tribunals composed of members of the military tribunals of the powers interested.

The recommendation of the Commission as to a general mixed commission to try such cases was rejected and the proposal of the American Commissioners in the memorandum laid before the Commission during its early sessions and repeated in its reservations was adopted by the Conference.

Furthermore no jurisdiction was conferred upon any tribunal over offences against "the laws of humanity," which had been, as I have indicated, vigorously opposed by the American representatives.

It was by no means an easy task to deal with the question of expressing properly mankind's condemnation of the individual, whose inordinate vanity and greed were chiefly responsible for the dreadful misery and waste which the world has endured and from the effects of which it will suffer for many years to come. It was difficult to subordinate the natural feeling of indignation and the instinct to do vengeance to a cold, dispassionate consideration of the character of the Kaiser's acts and their relation to law and justice. Yet one of the reasons that our country entered the war was to bring lawlessness to an end. We believed that an undeviating respect for law is essential to the prosperity and happiness of society and that the

rigid maintenance of law, however distasteful it may be, is an imperative duty. It was with a determination to follow these precepts, to treat impersonally and judicially the submission of the Conference, and to avoid being influenced by our own desires or by the pressure of public sentiment that we performed our duties as the American members of the Commission on Responsibilities and filed our reservations to the report of the Commission.

I have taken a good deal of your time and, I fear, have tried your patience unduly in reviewing this question of the trial and punishment of the Kaiser, and yet the deep interest which it has excited and the various opinions expressed by jurists and laymen which have been published seemed to me to entitle it to more than a passing notice.

There is also another class of legal questions which are raised by some of the provisions of the Treaty of Peace as well as by some of the propositions advanced at the Peace Conference. They are questions which have to do with constitutional powers and constitutional limitations. I shall not even attempt to suggest the subjects falling within this class. Those to which I have referred in detail pertain essentially to the principles and generally accepted rules of the law of nations and to the administration of international justice. To go beyond those subjects would be to enter the wide field of constitutional law. Into that field I shall not venture.

In conclusion let me emphasize by repetition what I said at the beginning of my remarks, because it seems to me that the world is approaching the most critical decision that it has had to make since history began. Let me repeat: Nationalism must be maintained at all hazards. It must not be supplanted by Mundanism. It is equally imperative that within the nation Individualism should not be subordinated to Classism. Individualism has been the great impulse to progress and liberty. It is the very lifeblood of modern civilization. Individual rights, not class rights, should engage our concern and invite governmental protection wherever threatened. If we, Americans, abandon Individualism we have bartered away our birthright, we have cast aside that for which our forefathers were willing to die. The same is true of Individualism among nations. It must be main-

tained if the peoples of the earth are to possess patriotism, love of liberty, and that generous devotion to national ideals which have made nations great and prosperous.

Peace and contentment are found in a nation where a free people live under just laws justly administered. So peace among nations will prevail when their conduct toward one another is governed by just laws and when they submit their controversies to an impartial judiciary which will decide them according to the immutable principles of justice.

To the achievement of this great good for the present and the future we should devote our thought and endeavor. To that end we should give our earnest support to Internationalism, a true Internationalism which is founded on a deep and abiding faith in Nationalism as the essential element of the present order. To-day by common purpose and by united effort much may be accomplished. If we wait for a more propitious time, that time may never come.

ROBERT LANSING.

THE TREATY PROVIDING FOR AMERICAN ASSISTANCE  
TO FRANCE IN CASE OF UNPROVOKED AGGRESSION  
BY GERMANY AGAINST THE LATTER

SECOND only to the proposed Covenant of the League of Nations in its claims upon the interest and attention of the American people and the Senate of the United States, and of far more importance and interest to them than the terms of the proposed treaty with Germany, outside of the section of that treaty which contains the Covenant of the League of Nations, is the proposed treaty with France. This document was submitted to the Senate by President Wilson on July 29th, with a view to securing the consent of the Senate to its ratification.

In addition to the analysis which needs to be made first of all of the terms of the treaty themselves, the proposed agreement suggests several reflections along different lines of thought, especially in regard to its relation to the proposed League of Nations and its relation to American constitutional law and diplomatic policy.

A reading of the text suggests that the pact was drawn with great care. The American plenipotentiaries were, evidently, extremely cautious, and insisted upon reducing the obligations assumed by the United States, by virtue of this treaty, to the very lowest points consistent with the accomplishment of the objects in view. In the third paragraph of the preamble it is a *fear*, more or less mutual, on the part of the contracting Powers, that the protective measures taken with respect to the left bank of the Rhine are incapable of assuring immediately to France and America adequate security and protection, which is given as the basis of the agreement. It is noteworthy that in the proposed British agreement it is said that "*there is a danger*" that the eventuality feared by the American and French negotiators may come to pass. In the final paragraph of Article I a double conjuncture of circumstances is required to bring the agreement into

operation: first, the failure, earlier apprehended or feared as possible, of the demilitarization provisions of the Versailles Treaty to give France appropriate security and protection, and, *in addition*, an unprovoked act of aggression on the part of Germany. By Article II the effectiveness of the treaty is made to depend upon the prior ratification of a similar treaty between Great Britain and the French Republic, and by Article III it is made dependent upon a certain specific sort of approval by the Council of the League of Nations. Ratification by the French Chambers, otherwise unnecessary, is required by Article IV. Finally, it is provided in Article III that the treaty shall be void upon and after a decision by the Council of the League that "the league itself affords sufficient protection." The result is a treaty as innocuous as possible within the limits of its inherent nature and effects.

The terms of the treaty do more than reveal the caution of some, at least, of the negotiators. They suggest certain questions upon other points. The accuracy of the first two considerations contained in the first paragraph of the preamble and the elliptical character of the reference, in the same paragraph, to the German aggression of 1914 might be called in question without seriously affecting the body of the agreement based upon them.

The apparent attempt, in the third paragraph, to represent the menace of aggression, and the protective stipulations of the Versailles Treaty regarding the Rhine areas, as bearing mutually upon France and America seems somewhat far-fetched, especially by comparison with the candid admission of the true state of affairs in the end of Article I.

There has been some comment upon the difference between the words expressing the obligation of America to go to the aid of France in the circumstances anticipated by the treaties and the analogous words in the British treaty, inasmuch as it is said that the United States "will be bound (*seront tenues*)" to come to the aid of France in such case, while Great Britain "consents (*consent*)" to do likewise. It is true that the former phrase emphasizes the idea of an unescapable obligation while the latter presents the idea of free and willing agreement. On the other hand, the phrase of the American treaty

might be looked upon as less likely to involve further negotiation and questioning, as being automatically operative, while the British term seemed further removed from actual effective operations.

The most pertinent questions which can be asked in respect to the proposed treaty are probably those regarding its relation to the proposed League of Nations. It is, by virtue of the first sentence of Article III, absolutely dependent for its effective existence upon the adoption of the proposed League Covenant, virtually as it stands in the Versailles Treaty or, at least, with the proposed Council organization still untouched. Otherwise the requisite approval could not be given.

Having been so approved, the treaty is intended to operate in *partial and temporary execution of the principles of the proposed Covenant regarding protection against aggression*. There is more significance properly attaching to the unconscious implications of the closing words of Article III in definition of the purpose of the treaty than to the lengthy explications of the preamble. In this character there are two elements deserving separate attention.

The temporary character of the pact is emphasized by the provision of Article III for its obsolescence upon the achievement of a certain set of circumstances in addition to the recurrent phrase "at first" in the paragraph of the preamble. The President told the Senate on July 10th that its "object is the temporary protection of France." On July 29th the President said that it was intended as a "temporary supplement" to the Treaty of Versailles for "the years immediately ahead," and he referred to the provision that the treaty should remain in force "only until, upon the application of one of the parties to it, the Council of the League . . . shall agree that the provisions of the Covenant of the League afford her sufficient protection." It is fairly certain that the President expects this arrangement *ad interim* to be of comparatively short duration, and the French and British views of the matter tend to confirm this. The *Temps* has described the function of the proposed treaty as follows: "*Tant que la Société des nations n'assurera pas par elle-même 'une protection suffisante' toute velléité d'agression allemande sera tenue en échec . . .*" This seems to agree with the interpretation of the President. This is worthy of all the

more attention because the British Prime Minister said, in the House of Commons, on July 21st, that the French treaty was "provisional in its character. On the face of it, it is a guarantee that lasts until France feels that the League of Nations is sufficiently established that she can depend on its workings;" he referred to the Versailles Treaty as the "more permanent" document.

There is one phase of this matter which is somewhat complicated and deserves to be closely examined. By Article III this treaty cannot come into operation until the Council has been established under the League; for otherwise the necessary approval could not be given. By Article III, likewise, the treaty is to lapse as soon as the League is decided to be firmly established (unless, indeed, it is to be assumed that *even though fully established*, the League is incapable of adequately protecting France because of inherent defects, an assumption impossible to make in view of the utterances just quoted). Hence the period of its vigor is closely circumscribed. It seems that, by insisting upon restrictions upon the date of its coming into effect and upon the length of its life, the treaty has been reduced to a minimum period of operation.

In the next place, the extent of the obligation under this treaty is, in some sort, less than the extent of the obligation under the proposed League Covenant. Throughout the clauses of Articles 12, 13, 15, and, especially, Article 16 of the proposed Covenant the pledge of the members of the League runs to the prevention of any aggression made previous to the requisite delay and discussion by the League, irrespective both of which nation possesses the advantage in the merits of the case on its substantive side and of the motives of aggression. In this treaty, however, only unprovoked aggression is provided against. It is also true that Article 10 of the proposed Covenant guarantees against all aggression (unprovoked or not), but what is here guaranteed is territorial integrity and political independence alone, and hence the scope of Article 10 is, in the end, less than that of the French treaty. Indeed, given the limited object of the guarantee in Article 10, it is hard to see either how this article could be invoked to interfere with an attack declared to be directed solely at objects short of conquest or why the article should have received so much more critical



attention than the first clause of Article 16. Article 10 is the embodiment of a more limited obligation than Article 16 or Article I of the French treaty.

While it is a temporary agreement in partial execution of the principles of the proposed League, the French treaty is not a "substitute" for the League except in point of time and it is a "supplement" to the League only in the sense that it supplies action which is properly the function of the League until the latter can come upon the scene in its own name. Once fully set up, the League is complete by itself without this treaty, and this treaty is not intended to stand permanently as an addition to the League, as has been seen. It is a simple technicological fact that it takes time to set up political machinery and set it in operation. The sort of protection of which France feels a need cannot be provided short of some mechanism either to place military assistance in northeastern France in very quick time, in case of a sudden attack from Germany, or to effect general and permanent disarmament. It will take time to achieve either of these under the proposed Covenant. In one case, as the President pointed out to the Senate on July 29th, the action of the League depends upon (a) action of the Council advising military assistance, and (b) action of the members in acceptance of that advice. Such assistance is very far removed until, at the very least, the Council is organized and set in steady operation. As for disarmament under Article 8 of the Covenant, that will be likely to require several years of investigations, reports, consultations, recommendations, revisions and legislative action before dependable results are obtained. This unpolitical and mechanical situation lies at the bottom of the French treaty.

The word "immediately" in the last paragraph of Article I might be taken to refer to action by the United States in a quicker fashion than that provided by the mechanism of the League, conceived as coexisting along with this treaty. This can, however, only be true of such period as intervenes between the formal establishment of the League and that point in time when it may be found by the Council to furnish "sufficient protection," in the words of Article III—a point which must, by bare logic, be assumed to be neither purely hypothetical nor indefinitely remote. The word might better be taken as purely

formal or, possibly, to refer to action undeterred by such delay as would be necessarily involved in setting up the League machinery. It certainly cannot be used to indicate an intention to dispense with the action of Congress as required by the Constitution, preceded by debate if necessary. Although M. Bourgeois complained on February 14th, in the plenary session of the Conference, that, under the proposed Covenant, "each nation will have to wait in order to act until a certain procedure is gone through and until for each nation a vote has been taken by its parliament," and that hence a more automatic device must be provided for the defense of France, it is certain that the delay referred to is involved, however desirable or undesirable it may be. President Wilson, in his letter to the Senate on July 29th, indicated that the proposed treaty aimed at action "without waiting for the advice of the Council of the League of Nations," but he did not pretend that the constitutional action of Congress was rendered superfluous.

If this line of reasoning is pushed to a logical conclusion it may appear that, as the approval of the Council is needed, under Article III, to give effect to the treaty, and as action by the Council is the only action necessary to give France the aid of the League, in addition to the action of the national parliaments which cannot be dispensed with in either case, there is no saving of time under the treaty and that it is intended to be a substitute or supplement for the League in quality rather than in point of time. Such appearance depends too much on bare logic and ignores political commonplaces. The Council could approve the treaty under Article III very quickly—if its members wished to do so—but the Council will have to have been a going machine for some time before France will feel confident of its ability to meet the emergency of sudden attack which she fears. The presence of both these elements of uncertainty, time and quality, in the principle at the basis of the French treaty, may be indicated by Mr. Lloyd-George's statement that the "experimental" character of the League made such a treaty necessary.

Bearing these relations to the principles and general existence of the proposed League, the treaty has more special relations to the Council as this organ is contemplated in Articles 2 and 4 of the Covenant. The Council "must (*devra*)" approve the treaty (*sc.*, to give

it validity), deciding by a majority vote if necessary. The Council is to be called upon to decide, also by a majority vote, if necessary, upon the existence of a state of facts which would cause the treaty to lapse of its own terms.

It would appear that the framers of the treaty reckoned without their host in the clauses referring to a majority vote. Article 5 of the Covenant provides that, "Except where otherwise expressly provided in this Covenant or by the terms of the present treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the members of the League represented at the meeting." Under Article 26 of the Covenant it is impossible for the signatories of the French treaty to amend the Covenant by virtue of this treaty, and the conflict seems to be clean and clear. It is true that the President told the Senate on July 29th that the French treaty was intended to be "in effect a part of" the Treaty of Versailles, but in form it was not a part of the treaty with Germany and can hardly be brought under the requirements of the Covenant by that reason.

If the voidance of the French treaty, under the second part of Article III, were the only action in question it might be contended by the three Powers parties to the treaty that the rule of unanimity in Article 5 of the Covenant was intended as a maximum rule necessary in all cases where the interested party needed to be protected against being overruled contrary to his own consent and that, inasmuch as they, the parties interested, had consented to a decision by a majority vote in this case, the rule of unanimity did not require to be insisted upon. Even this laborious plea, however, could not avail to defend the attempt to dispense with the majority rule in the first part of Article III of the French treaty, for in the recognition of the treaty by the Council the non-treaty Powers are precisely those parties in interest most logically destined for protection by the unanimity rule, and they may be expected to insist upon this fact.

What might happen can be conjectured from the language of Article III of the treaty. The party most desirous of seeing the treaty valid may be expected to bring the text to the attention of the Council at its first meeting and ask for its recognition as an engagement consistent with the Covenant, in the sense of Article 20 of the Covenant.

It would then lie open to any other member of the League to point out the inconsistency above referred to between Article III of the treaty and Article 5 of the Covenant. In that case the treaty would have to be revised to meet the requirements of Article 5 or it would have to be abandoned as inconsistent with the Covenant. Inasmuch as the inconsistency would, upon this point, be one of procedure and not of substance, the former expedient might be expected to be adopted.

To carry the speculation still further, it appears that the revision of Article III of the treaty to include the principle of unanimity would have curious results. Once such a step is taken, one Power in the Council—Great Britain, the United States, France, Italy, Japan, Belgium, Brazil, Spain, or Greece—could prevent the treaty from being accepted by the League; and one Power could later prevent it from lapsing, when the Power least anxious for its perpetuation moved for its voidance, under the second part of Article III. This means that, besides the Powers providing France with their guarantee of protection, who may be expected to maintain their attitude as of the time of signature and vote for its recognition, any Power in the Council discontented at being left out of the Anglo-Franco-American arrangement could block its recognition at the start and that, later, the beneficiary, France, would have to consent to see the treaty lapse before the second part of Article III could operate. It is interesting to note that Mr. Lloyd George said, in the House of Commons, on July 21st, that the guarantee "lasts until France feels that the League of Nations is sufficiently established that she can rely on its working."

The discussion has heretofore been confined to the legal and logical aspects of the problem. In such a situation, however, the legalities are often less decisive than the political forces operating in the same field, and hence it is necessary to register the consciousness that the aggregate political power and influence of the three chief allied and associated Powers may be expected to operate as effectively as possible within the limits of the law; whatever can possibly be done in accomplishing the desired object will be done, despite the presence of the six other members of the Council.

Furthermore, it is impossible here to deal with the suggestion that the proposed treaty conflicts with the *spirit* of the Covenant. Unless a plunge is to be made into the whole sea of political and ethical controversy which is raging in our day about these barely nascent islands of international organization, it must be insisted that the approval of the Council under Article 20 of the Covenant and Article III of the treaty—revised to agree with Article 5 of the Covenant—would be sufficient to quiet all dispute upon this question.

Finally, as Mr. Lloyd George tried to make clear on July 3d and again on July 21st, the treaty is a part of that movement to put military sanction behind international treaties and international law from which the League itself took its rise. It is an embodiment in miniature of that demand for an organization to enforce law and peace in the world of which the League is the full expression; it is the League in embryo.

To Americans, however, the relations between the proposed treaty and the domestic, political and legal structure are of more piquant interest. As a result of the geographic and economic situation of the nation and of the foreign policies resulting from that isolated situation, there is an instinctive negative reaction in the mind of the American citizen when the idea of political and legal connections with the Old World is presented. When that possible connection happens to be described as an "alliance" the reaction is extremely powerful. From opposition to permanent and entangling alliances under the advice of Washington and Jefferson, respectively, in 1797 and 1801, we have come instinctively to oppose all alliances whether permanent or temporary, whether "entangling" or not.

For this reason, coupled with the current widespread affection and good-will toward France, there has been significantly little debate on the proposed treaty; the two mental currents neutralize one another and result in embarrassed and troubled silence. Those who once would have been called "pro-Ally," and especially those of strong French sympathies, are inclined in its favor, while, in the more detached and prosaic American, the old love still exerts a powerful influence.

Much care must be used in describing the arrangement. It does not create an "alliance," with undefined or general obligations, but

establishes a specific and definite obligation. The President is reported to have insisted, speaking to correspondents at the Capitol on July 10th, on the inaccuracy of such a term to describe the arrangement in question.

If it be insisted that such an arrangement is properly to be described as an "alliance," it would still be true that it is a temporary alliance strictly, thus meeting Washington's demand, and, more important still, it is not an "entangling" alliance, inasmuch as that term refers to alliances which are capable of involving their members in unforeseen results because of the indefinite and general character of the obligations assumed.

For the obligation here assumed is as definite as the terms available can make it. It proves nothing to insist that "unprovoked aggression" is incapable of clear and general definition, for this phenomenon is characteristic of many phrases in use in national as well as international law and politics, such as "reasonable restraint," "fair return," and "due process of law," and until more precision is given to the rules of political and legal science such terms must be used. Under such circumstances the parties in interest (here Congress, as the war-making power) must, in the absence of a competent court, be left free to interpret their obligations as they see fit, as was pointed out by the President on July 10th, in conversation at the Capitol, regaining in this freedom what is lost in committing the national responsibility to *relatively* ill-defined obligations. That action to exercise such freedom may, in the situation when it develops, lead to sharp dispute over the extent of the obligations assumed is due to the fact that the technique of international political and legal relations is so incomplete, as already mentioned; but if this fact were used to prevent international political and legal actions from being taken at all, the result would be simply to perpetuate the very obstacle in question and to lapse into a fatuous frustration of no promise whatever.

It is, however, essential to exclude an interpretation put upon the treaty by Mr. Lloyd George in the House of Commons on July 3d, when he said that the treaty did not engage Britain to assist France in war with Germany in all cases, but only "if there is wanton prov-

ocation on the part of Germany." Clearly this is sheer carelessness of statement. Certainly France cannot, under this treaty, claim British and American aid for war upon Germany upon any provocation. Such a result is very far removed from being able to call for aid in resisting unprovoked attack; France, it would seem, could not, under the proposed treaty, even hope for Anglo-American aid to resist an attack if she had herself provoked it.

The term "aggression" as used in the treaty must refer to some overt act and is hardly short of the term attack, in the sense of military action. Mr. Lloyd George spoke of "wanton and unprovoked attack" in the House of Commons on July 3d, in discussing the treaty; on July 21st he referred to the French desire to have aid "if Germany repeated the attacks of 1870 and 1914." President Wilson, on July 29th, was more liberal in his interpretation of the intent of the treaty, speaking of a "movement of aggression" by Germany as the *casus fœderis*. This is a more liberal rendering of the French "*acte d'aggression*" than would seem to be necessary, and broader than the normal content of the phrase in French parlance.

The President has expressed his views in regard to a matter somewhat akin to the French treaty in previous utterances. On September 27th, 1918, the President declared in New York City: "Third, there can be no leagues or alliances or special covenants and understandings within the general and common family of the League of Nations;" and at Manchester, on December 30th, he said: "If the future had nothing for us but a new attempt to keep the world at a right poise by a balance of power, the United States would take no interest, because she will join no combination of power which is not a combination of all of us." As a result of these utterances it might be suggested that the French treaty marks the reversal of an earlier program. However this may be—and whether reconsideration of the conditions have actually made necessary such a revision of the earlier program is of less moment than what has actually taken place—the utterances quoted do serve to indicate the nature which its chief participant must conceive it to bear and the fashion in which, for a year and a half, or more, in the future, he will seek to execute it. In such a view, the agreement is not an embodiment of the idea of the balance of

power, but a temporary embodiment of that general organization of international power against the single potential aggressor which is attempted in the proposed League. It is not a partial combination of Powers so much as the temporary representation of the general combination to be set up as soon as technically possible. It is not an alliance, league, covenant, or understanding within the League, but an agreement preceding the League in time and, so far as the purposes demand it, of like scope and nature.

In the view of the law of the land, however, such benevolent purposes are less decisive, and the Constitution exacts appropriate results, not good intentions. It is necessary to compare the provisions of the document with the requirements of the Constitution to see whether there is any conflict between the latter and what its framers have attempted to write into the former. The possible difficulty arises in connection with Articles II and III of the proposed treaty. Here the validity of the whole treaty is made contingent upon certain actions on the part of Great Britain and the Council of the League of Nations. It is not necessary here to review again the entire consistency of a treaty pledge to go to war, such as is contained in Article I, with the war-making power of Congress under the Constitution; reference may, perhaps, be made to the territorial guarantee contained in the provisions of Article XXXV of the treaty with Colombia (New Granada) in 1846, and to Article I of the treaty of 1903 with Panama. The former declares, *inter alia*, that "the United States also guarantee, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory;" and the latter declares that "the United States guarantees and will maintain the independence of the Republic of Panama." When the President of Panama, on August 9th, expressed fears that the Senate was of a mind to go back upon this guarantee as unconstitutional, the Senators upon whose utterances the fears were supposed to be based promptly denied any intent to question the constitutionality of the Panama treaty.

But it is necessary to determine whether the operation of a treaty can be made dependent upon action by a foreign state or an international body as is done in Articles II and III. Treaties, the treaties made by the United States included, are nearly always dependent for



their effects on certain contingencies contained in the fulfilment of their terms, as, the payment of money, certain reciprocal actions on the part of the other contracting party, and so on. These contingencies reside in the terms as agreed to by the treaty-making power, and do not relate to the formal validity of the treaty. So, it would seem, the action of third parties may be written into the treaty as a condition necessary to call forth certain action on the part of the United States. So long as the provisions of the Constitution and the rules of international law are otherwise left intact, as they well can be, in such cases, there seems to be no obstacle to this step, as contained in Article II of the present treaty.

To agree that the treaty shall lapse upon the accomplishment of a certain set of facts, to be determined by an international body, seems to go further in the development of the treaty-making power. This is due to the fact that the provisions of the Constitution creating the treaty-making power are very brief, in view of the tremendous importance now, one hundred and thirty years after they were drawn, of international relations; and, secondly, to the inadequacy of our science upon the relations between national and international law and political organization. If the President should try, with Senatorial assistance, to delegate the power to negotiate treaties in the name of America to an international council, the action would certainly be unconstitutional; and if this treaty is ratified it will still be open to the Senate to renew the treaty if it lapses. It does not appear, however, that any Constitutional rule or power is injured by action on the part of the treaty-making power in defining the date of termination of this treaty in terms of the sort used in the last part of Article III instead of in terms of the calendar.

Still more troublesome, at first sight, if the treaty is to stand criticism, is the provision in the first part of Article III, requiring the recognition of the Council of the League for the validity of the treaty. This feeling of doubt regarding the introduction of such a requirement is due chiefly to the causes just reviewed in another connection. It is due also to a failure to notice the elementary fact that the treaty-making power is continually inserting into its agreements stipulations requiring ratification of those agreements and the exchange or deposit

of ratifications, requirements which originate in common international law, apart from the Constitution entirely, and which do go to the formal legal validity of the treaty as an act of the treaty-power. The treaty-power is given authority by the Constitution to make treaties with other nations *according to the manner approved among nations*. The requirements in the first part of Article II of the French treaty, like the requirements in Article 18 of the proposed Covenant, are on a par with the insertion of requirements for ratification in every treaty negotiated by the United States in the last fifty years. It is still more comparable with the provision of Article XIV of the Congo treaty, ratified with the consent of the Senate in 1892, where the operation of the treaty was made to depend absolutely upon the entering into force of a joint declaration signed by the Powers in Berlin in 1890, relating to the same subjects: "It is well understood that if the declaration on the subject of the import duties, signed July 2, 1890, by the signatory Powers of the Act of Berlin, should not enter into force, in that case, the present treaty would be absolutely null and without effect." The French treaty is not unconstitutional.

When these considerations have been completed it may be allowable to dwell briefly upon the diplomatic side of the affair. It is supposed that the treaty was a concession made to the fear, on the part of the French, of a repetition of the unprovoked attack launched against France by Germany in 1914. It was, in some measure, a substitute for the general staff and the commission to enforce or supervise the measures for disarmament to be taken under Article 8 of the Covenant, which had been urged by France but which the other Powers did not feel free to accept as part of the League system.

On the surface it may seem strange that the most powerful military nation on the continent should feel it necessary to demand such measures of protection against the only great Power on the continent which has been forced to disarm. As the *Temps* said, this arrangement provides "the most powerful coalition that the world has ever seen" in order to check the ravages of what now passes for "Germany." Mr. Lloyd George declared on July 3d, that he did not anticipate any attack from Germany, because he believed Germany had had enough. It might even appear that the object of the French

Government was not so much to protect France against an attack which was really feared as possible, but that the Government, knowing the helplessness of Germany in fact, although not allowing this state of the facts to be known widely in the country, was actually aiming at some more pretentious objective. If this were to appear from the facts in the case it would be beside the point to say that, once signed, this treaty might be counted upon to operate automatically to inhibit in its origin the very aggression which it is designed to defeat and that, therefore, the fear of having to go to war under the treaty would be unnecessary. The question in such circumstances would resolve itself into that of the desirability of the results really aimed at. If, for example, it is the purpose of the Quai d'Orsay to contrive a continental hegemony for France by grouping America and Britain with France in the League as a triumvirate to rule the continent and the seas, and, on America's part, to clothe this system in seemly guise, the desirability of the treaty is related differently to the prospects of its success. If the treaty is to be used to prevent German action in suppression of rebellion in the Rhineland similar to the recent rebellion and attempted secession in Mainz, the question may again be different. Moreover, if France fears attack from Germany now, with Germany disarmed and France armed, how can she be expected to feel when, under Article 8 of the Covenant, Britain and France have disarmed? And how can this treaty be a compensation for the rejection of a proposal to make this disarmament more certain and drastic? Is there not something inconsistent here?

As a matter of fact, while all these possibilities deserve to be borne in mind and recorded for consideration, and even though they were true representations of the French policy, the determining factors are more substantial and more deep-seated. Though the need for French fear of a repeated German attack seem slight from this distance, the state of feeling in France—even in Government circles—is determined more by the facts of 1870-1914 than by the facts of 1918-1919. The relative numbers of the populations of the two nations are permanent factors which will count when the present German collapse is a thing of the past. It is conceivable that the delay in getting the League into effective operation may be very serious. From the urgency with which

M. Bourgeois pressed the French demand for a general staff under the League to provide immediate and automatic defense in case of a German attack, there can be no doubt of the reality of the fear of such an attack on the part of the French. That this is or may be due to the relative positions of France and Germany, in view of the Treaty of Versailles, in the matter of territorial acquisitions, indemnities and colonial holdings, is irrelevant to the fact that France does fear an attack. She can hardly be exposed to such an attack with good-will unless we deny the justice of the terms of the treaty of Versailles.

Finally, even if the facts were as stated, the temporary character of the arrangement and the liberty of the United States, especially with the pressure of war removed, to defeat any attempt to use her aid and her specific guarantee as a basis for general political prestige for France may be counted on to maintain things at their proper attitude. All such speculation gets so far away from the established facts and dependable bases of legal and even political thought that it is hardly useful except as to stimulate inquiry and reflection.

There is another aspect of the case which may be examined for a moment. Does this treaty indicate the belief on the part of France that the Peace of Versailles is, having regard to its terms alone, defective? Doubtless there are among the military and political leaders of France men who believe that, in failing to install France upon the left bank of the Rhine, the Congress of Paris made a serious mistake. On the other hand, it is probably patent to most French statesmen of the more reflective sort that in this day and generation any *physical* guarantees which it is possible to devise are likely to be ineffective in the end, that the ideal of *absolute* security along these lines is not to be attained, and that, inasmuch as security must mean, in this day of political flex and flow, a position fortified by political arrangements rather, such a guarantee as the one under discussion is the only sort of permanent value. Unless the provisions of the Treaty of Versailles were such that, suiting all parties to the treaty in equal fashion, it could be counted upon to stand upon its own merits—a condition of things which is not, apparently, the case, however much such a condition may represent the standard assumption of international law—some guarantee from without is necessary. Hence the League of Na-

tions; and hence this Anglo-Franco-American arrangement. Both are made necessary by what are probably permanent features of the international organization and practice of the world.

The fact that the traditional American attitude upon alliances arose from a French treaty serves to suggest a comparison between the French treaty of 1778 and the present proposed treaty. Articles I, II, XI, and XII, the more significant parts of the treaty of 1778, read as follows:

I. If war should break out between France and Great Britain during the continuance of the present war between the United States and England, His Majesty and the said United States shall make it a common cause and aid each other mutually with their good offices, their counsels and their forces, according to the exigence of conjunctures, as becomes good and faithful allies.

II. The essential and direct end of the present defensive alliance is to maintain effectually the liberty, sovereignty, and independence absolute and unlimited, of the said United States, as well in matters of government as of commerce.

XI. The two parties guarantee mutually from the present time and forever against all other Powers, to wit: The United States to His Most Christian Majesty, the present possessions of the Crown of France in America, as well as those which it may acquire by the future treaty of peace: And His Most Christian Majesty guarantees on his part to the United States their liberty, sovereignty and independence, absolute and unlimited, as well in matters of government as commerce, and also their possessions, and the additions or conquests that their confederation may obtain during the war, from any of the dominions now or heretofore possessed by Great Britain and North America, conformable to the 5th and 6th articles above written, the whole as their possession shall be fixed and assured to the said States, at the moment of the cessation of their present war with England.

XII. In order to fix more precisely the sense and application of the preceding article, the contracting parties declare, that in case of a rupture between France and England the reciprocal guarantee declared in the said article shall have its full force and effect the moment such war shall break out; and if such rupture shall not take place, the mutual obligations of the said guarantee shall not commence until the moment of the cessation of the present war between the United States and England shall have ascertained their possessions.

The treaty of 1778 thus was more general in its objects; it guaranteed certain French territorial possessions, pledged American aid in any war between France and Great Britain, and recognized pos-

sible French conquests in the West Indies. It was more general by the terms used; the arrangement was called explicitly a "defensive alliance" and the pledges are described technically as "guarantees." By side of the treaty of 1778 the present proposed treaty is very limited and circumspect.

The later history of the treaty of 1778 was not smooth. When France, now Revolutionary France, felt herself compelled to make war upon Great Britain in 1793, the American aid referred to in the treaty of 1778 was not forthcoming. The French do not seem to have formally demanded the aid which might have been expected under the treaty, and, espousing more or less completely the Hamiltonian view that the treaty, made with Louis XVI, could not run in favor of the Republic and that the necessity of American safety demanded neutrality on our part, Washington issued the historic proclamation of 1793, forerunner of his injunction of 1797 to the American people to avoid all "permanent alliances." Thus Revolutionary France was left to struggle against the "impious band of tyrants" alone.

Such a situation can with difficulty be foreseen in connection with the present treaty. To duplicate the very dangerous situation of 1793 we should have to imagine a Socialist Revolution in France, and, perhaps, a change of party in America, followed by an attack from conservative Germany to prevent the spread of the Bolshevik revolution eastward over the Rhine. In such a case the situation would be instructive for the student of historical parallels.

In point of fact, things much more prosaic are likely to happen, and the legalities of the case, the formalities of the League, the Council, the Covenant and their relations to the proposed treaty, together with the relations of the treaty to American legal and political structure and practice are the matters deserving most study. In this connection it does not appear that the treaty is open to definitive objections, although its provisions do need revision in two places and although its more or less conjectural potentialities are felt to be of serious import for both America and the League.

PITMAN B. POTTER.

## THE INTERNATIONAL REGIME OF PORTS, WATERWAYS AND RAILWAYS

### PART XII OF THE TREATY OF PEACE WITH GERMANY

FOLLOWING the precedents of previous international conferences, including those of The Hague of 1899 and 1907, the work of preparing clauses on particular subjects for insertion in the Treaty of Peace with Germany was entrusted by the Conference of Paris to various commissions. One of the commissions appointed by the Conference of Paris was the Commission on Ports, Waterways and Railways.

Space will not permit a review in detail of the proceedings of that Commission.

Discussion will only be attempted of the results of its labors, as found in the pending treaty, for in substantially the form adopted by the Commission, the articles of the treaty which are found in Part XII, represent the clauses adopted and reported by the Commission on Ports, Waterways and Railways.

The Commission was composed of nineteen members, representing fourteen Powers, the five Powers "with general interests" having each two representatives (United States, Great Britain, France, Italy and Japan) and nine other Powers having each one representative.<sup>1</sup>

Signor Crespi, Italian Minister of Food, was president, and Honorable A. L. Sifton, of Great Britain, vice-president of the Commission; the work was in part conducted at meetings of the full Commission, and in part by means of two subcommissions, the first, of ten members under the presidency of Mr. White, of the United States, dealing

<sup>1</sup> The personnel of the Commission is given in this JOURNAL for April, 1919, p. 183. The Hon. Henry White and the writer represented the United States.

with questions relating to Freedom of Transit, and the second, of nine members, under the presidency of M. Weiss, of France, dealing with the Régime of Ports, Waterways and Railways.

By invitation of the Commission, the representatives of Switzerland and of Holland were heard at length on the subject of the Rhine.

Turning to the treaty, it will be seen that Part XII, "Ports, Waterways and Railways," contains sixty-six articles (about one-tenth of the treaty) divided into six sections, two of which (Sections II and III) are in turn divided into chapters. The arrangement is perhaps as logical and convenient as the subject-matter permitted. It is to be emphasized, however, that in regard to any particular question, the inter-relation of various provisions of Part XII requires a careful consideration of its clauses as a whole, and further that other parts of the treaty (the Reparation and Economic clauses and the Covenant of the League of Nations, for example) must in some cases be looked at.

Articles 321 to 326 (Section I) and Articles 327 to 330 (Section II, Chapters 1 and 2) contain clauses which may generally be described as requiring Germany to give equality of commercial treatment to all the Allied and Associated Powers, an equality of treatment, moreover, similar to that given by Germany to German nationals. These provisions are not reciprocal, that is to say, they bind Germany alone, and the Allied and Associated Powers are not required to treat Germany as Germany is required to treat them.

A qualification of the utmost importance, however, as regards these articles is introduced in Article 378, which provides not only that the provisions mentioned shall be subject to revision by the Council of the League of Nations at any time after five years from the coming into force of the present treaty, but also that after the five years' period no Allied or Associated Power can claim the benefit of any of the stipulations of these Articles, "in which reciprocity is not accorded in respect of such stipulations." While the period of five years during which reciprocity cannot be demanded may be prolonged by the Council of the League of Nations, such prolongation would require, under Article 5, a unanimous vote of the Council, and there is, of course, nothing to prevent the Allied or Associated



Powers or any of them from extending reciprocity in the meantime if they so desire.

It will thus be seen that the provisions of Articles 321 to 330 are of a very general importance and not only of a particular importance as regards Germany, for they are provisions which, in the contemplation of the Powers opposed to Germany, may well become reciprocal and which indeed must either disappear or become reciprocal after a very limited period.

Accordingly, in every general or special convention hereafter framed, relating to this subject, it may be supposed that these provisions will form at least partially the basis of discussion.

In this connection, the remark contained in the memorandum annexed to the letter of M. Clemenceau on behalf of the Allied and Associated Powers, addressed to the President of the German Delegation on June 16, 1919, may be quoted.

The Covenant of the League of Nations refers specially in Article 23 (e), to "provision to secure and maintain freedom of communications and of transit, and equitable treatment for the commerce of all members of the League. In this connection the special necessities of the regions devastated during the war of 1914-1918 shall be borne in mind." This freedom of communications and equal treatment for all nations on the territory of Germany are exactly those laid down and guaranteed in Part XII of the Conditions of Peace. Until general conventions, which will be integral parts of the statute of the League of Nations, can render possible a wider application of these principles, it has appeared necessary to insert at once the essential provisions of such general conventions in the Treaty of Peace so that an enemy state may not, by future obstructive procedure and for political reasons, prevent their being put into force, and further to insist in advance that such general conventions shall be accepted in their entirety in the future. Provision is formally made for the extension of these provisions and for the ultimate grant of reciprocity in respect of all such as are capable of being made reciprocal, but only after five years, unless the Council of the League of Nations decides to prolong that period. It would not have been possible, by immediately granting equal treatment to Germany, to allow her to profit indirectly from the material devastation and the economic ruin for which her Government and her armies are responsible. But at the end of this period Germany will be able to claim on the territory of the Allied and Associated Powers the application of those measures which she to-day describes as constituting a meddling with her in-

ternal organization which cannot be borne, or, alternatively, she will herself cease to be bound thereby.

Looking now at these provisions in some detail, they first provide for freedom of transit of "goods, persons, vessels, carriages, wagons and mails, coming from or going to the territories of any of the Allied and Associated Powers, whether contiguous or not."<sup>2</sup>

Goods in transit are exempt from customs duties and the transportation charges are to be reasonable and are not to depend in any way on the ownership or nationality of any means of transportation employed (Article 321). Somewhat similar provisions regarding transit to and from free zones in German ports are found in Article 330.

Article 322 relates to what is called "transmigration traffic" and is intended to do away with the advantages which were given by Germany before the war to German steamship lines in regard to this emigrant traffic.

The remaining provisions of Section 1 (Articles 323 to 326) establish the rule that the commerce to the Allied and Associated Powers into, from, or across Germany is to be accorded the treatment given to German commerce. The various detailed clauses, such as the prohibition of "any direct or indirect bounty for export or import by German ports or vessels," are intended to be sufficiently inclusive to frustrate any invasions of the general principle, the only exception to which is in regard to the prohibition of discrimination in matters of transportation "based on the frontier crossed," which is "subject to the special engagements contained in the present treaty."

In this connection reference should be made to the special exceptions regarding Alsace-Lorraine, Poland and Luxemburg, found in Articles 68 and 268, and also to the special provisions as to customs duties, to continue for a period of three years pursuant to Article 269, and to the possibility of a special customs régime in German occupied territory provided for in Article 270. These articles appear

<sup>2</sup> The quotation is from the English text. The French text reads as follows:

" . . . personnes, marchandises, navires, bateaux, wagons et services postaux en provenance ou à destination des territoires de l'une quelconque des Puissances alliées et associées, limitrophes ou non."

in the Supplement to the last number of the JOURNAL, pp. 184, 286-288.

The stipulations of Articles 264 to 267 are also of importance in connection with the general clauses mentioned, as they relate to importation, exportation and transit in general. These likewise appear in the Supplement for July, 1919, pp. 285, 286.

According to the general principles mentioned, the subject of navigation is treated in Article 327. The nationals, vessels and property of the Allied and Associated Powers are to be given the same treatment as that given by Germany to German nationals, German vessels, and German property. The general phraseology is supplemented by particular mention of facilities, charges and restrictions of various kinds.

Articles 328 to 330 relate to free zones in German ports. It may fairly be said that these provisions are, in general, such as are recognized as applicable to such a system. Special provision is made, however, that the free zones existing on August 1, 1914, shall be maintained, and that aside from the charges necessary for covering expenses of upkeep, etc., no other charge may be levied on goods, except a statistical duty of one-tenth of one per cent *ad valorem*. The provisions of Article 327 regarding the treatment of vessels, are, of course, applicable to their treatment in ports containing free zones, and it is out of abundant precaution specifically provided that these conditions of equality are applicable therein.

In considering this subject, reference should be made to Articles 363 and 364, which provide that in the ports of Hamburg and Stettin there shall be leased for ninety-nine years to the Czecho-Slovak State areas to be used for the transit of goods to and from Czecho-Slovakia, and that these areas are to be placed under the general régime of free zones, to which allusion has just been made. Such clauses are, of course, novel and in a very practical way give to the Czecho-Slovak State access to the sea. While imposing upon Germany an international servitude in the nature of a lease for ninety-nine years, it can hardly be doubted that the provisions will be of benefit to Germany herself, as they will necessarily develop her own trade. Nor can any of these conditions be imposed which would continue un-

changed for such a long length of time, as the conditions of the lease, which are to be fixed by a commission of three members on which both Germany and Czecho-Slovakia are represented, are similarly subject to revision every ten years.

In connection with these last-mentioned articles which are intended to protect the interests of Czecho-Slovakia, Article 273, permitting the issuance of certificates and documents to vessels of new states, "whether they have a seacoast or not," is of much interest, and as this article is not within the part of the treaty particularly under consideration, it is quoted in full:

In the case of vessels of the Allied or Associated Powers, all classes of certificates or documents relating to the vessel, which were recognized as valid by Germany before the war, or which may hereafter be recognized as valid by the principal maritime states, shall be recognized by Germany as valid and as equivalent to the corresponding certificates issued to German vessels.

A similar recognition shall be accorded to the certificates and documents issued to their vessels by the governments of new states, whether they have a sea-coast or not, provided that such certificates and documents shall be issued in conformity with the general practice observed in the principal maritime states.

The High Contracting Parties agree to recognize the flag flown by the vessels of an Allied or Associated Power having no sea-coast which are registered at some one specified place situated in its territory; such place shall serve as the port of registry of such vessels.

While the provisions giving rights to Czecho-Slovakia in the ports of Hamburg and Stettin have been called novel, the convention between Greece and Serbia of May 10, 1914, and the four protocols thereto of the same date, relating to transit by Salonica may well be regarded as foreshadowing provisions for access to the sea of an inland state. It may particularly be noticed that this convention, the workings and advantages of which were explained to the Commission on Ports, Waterways and Railways by the learned Mr. Coromilas (the Greek representative), very early in the proceedings of the Commission, was by its terms to continue for fifty years.

In view of the existence of Austria, Hungary and Czecho-Slovakia, all of which are land-locked states, the convention mentioned may now be regarded as of more than local interest and importance, and

a translation thereof is printed in the Supplement to this issue (p. 441).

The principles and rules of international law applicable to international rivers have been the subject of discussion from an early period, particularly during the last century and a half. The river systems of Europe and the canal systems which complete or connect them are of an importance in the commercial life of European countries and of their peoples which can hardly be underestimated. The principle of freedom of international rivers has been contended for at least since 1792, but it may justly be said that that principle was never fully recognized until the adoption of the Treaty of Peace with Germany. The basic principle of what must now be regarded as the public law of Europe in this regard is declared in Article 332 of the treaty, the first paragraph of which reads as follows:

On the waterways declared to be international in the preceding article, the nationals, property and flags of all Powers shall be treated on a footing of perfect equality, no distinction being made to the detriment of the nationals, property or flag of any Power between them and the nationals, property or flag of the riparian state itself or of the most favored nation.

Side by side with this declaration of principle may well be placed the declaration of the French Provisional Executive Council in its decree of September 20, 1792, which has thus waited one hundred and twenty-seven years for complete realization of its ideal of freedom, now extended to all states, riparian and non-riparian.

Que le cours des fleuves est la propriété commune et inaliénable de toutes les contrées arrosées par leurs eaux; qu'une nation ne saurait sans injustice prétendre au droit d'occuper exclusivement le canal d'une rivière et d'empêcher que les peuples voisins qui bordent les rivages supérieurs, ne jouissent du même avantage; qu'un tel droit est un reste des servitudes féodales ou du moins un monopole odieux qui n'a pu être établi que par la force, ni consenti que par l'impuissance, qu'il est conséquemment révocable dans tous les moments et malgré toutes les conventions, parce que la nature ne reconnaît pas plus de peuples que d'individus privilégiés et que les droits de l'homme sont à jamais imprescriptibles.

It should be here stated, however, that the provisions of Article 332 are specifically within the terms of Article 378, permitting re-

vision by the Council of the League of Nations at any time after five years, or such extended period as may be fixed, and providing further that after this period the benefit of the provisions can only be claimed by a state which extends reciprocity in that regard.

By the general clauses of Chapter 3, Section 2 (Articles 331 to 339) four rivers are declared to be international—namely:

The Elbe (Labe), from its confluence with the Vltava (Moldau), and the Vltava (Moldau) from Prague;  
the Oder (Odra) from its confluence with the Oppa;  
the Niemen (Russtrom-Memel-Niemen) from Grodno;  
the Danube from Ulm;

and this international status is extended to "all navigable parts of these river systems which naturally provide more than one state with access to the sea, with or without transshipment from one vessel to another; together with lateral canals and channels constructed either to duplicate or to improve naturally navigable sections of the specified river systems or to connect two naturally navigable sections of the same river."

Under the last quoted *general* terms the upper navigable part of a river may not be international, although its lower courses are; for the upper navigable portion, if and so far as it is wholly within one state, provides that state only with access to the sea.

The general regulations applicable to these rivers may be summed up as follows:

(1) Charges (if not precluded by an existing connection) which may vary on different sections of the river, are limited to those sufficient to maintain an improvement to the river or to meet expenditures in the interest of navigation.

(2) Charges are to be collected so that detailed examinations of cargoes are to be unnecessary.

(3) Customs and consumption duties are not affected.

(4) The general provisions regarding transit, above alluded to and contained in Articles 321 to 326, are applicable.

(5) Special provisions regarding transit are provided both in the

case when the two banks of the rivers are within the same state and in the case when the river forms a frontier.

(6) Each riparian state must remove any obstacle or danger to navigation and insure the maintenance of proper conditions of navigation, and for failure to fulfil this duty complaint may be made to a tribunal which the League of Nations shall institute.

Special notice should be given to Article 337 regarding the construction of works which might impede navigation. So far as dangers to navigation are concerned, the interests of all are alike, or substantially alike, but in the case of works to be constructed, the interests of the constructing state may conflict with the interests of other riparian states, or of non-riparian states. The same tribunal, to be instituted by the League of Nations, is given jurisdiction in all such matters, but it is provided that appeal to the tribunal mentioned does not require the suspension of such works, and, further, that allowance shall be made for national interests, including specifically irrigation, water-power, and fisheries. These national interests, indeed, are to be given priority when such priority receives the consent of all the riparian states or of the states represented on the International Commission, if such commission exists.

It is to be pointed out that later articles provide for international commissions for the four river systems mentioned, except the Niemen. As to this river system, the International Commission is to be constituted upon the request of any riparian state.

The treaty contemplates a general convention to supersede the stipulations of the Treaty of Peace, applicable not only to the four river systems mentioned, but to others which that general convention may recognize as international. The purpose of the Treaty of Peace primarily, of course, was necessary to impose terms upon Germany, and it is obvious that a general convention relating to international rivers would cover a subject in which neutral states would be deeply interested. For this reason the preparation of such a convention was not attempted at the Conference of Paris, although it is not to be doubted that the provisions of the Treaty of Peace will be adopted in substance in any general convention hereafter drawn up, as they embody advanced and enlightened principles of equality. The treaty

provides that while this general convention is to be drawn up by the principal Allied and Associated Powers, it must have the approval of the League of Nations; the approval of Germany, which would be essential, is assured in advance.

Article 339, the final Article of the general clauses comprising Chapter 3 of Section 2, requires the cession by Germany of a portion of the tugs and vessels registered in the ports of the four river systems mentioned and of the appurtenant material. For this cession Germany is to receive credit on account of the sums due from her, and the details of vessels and material ceded and of the amounts of credit therefor are to be determined by arbitrators nominated by the United States. Equitable principles are laid down for determining the quantity of vessels to be given up by Germany.

It will perhaps be generally agreed that such provisions are an essential part of the Treaty of Peace. It would be a vain thing to declare these river systems international and at the same time not to provide the riparian states with the means of using them. True, these means might be constructed, but the necessity of now restoring the economic life of Europe renders any such delay impossible. River traffic under the commercial control, not of one riparian state but of all, must commence at once. The necessity of this could be doubted by no one who had seen even in a limited degree the extent of the breakdown of the transport system of Europe caused by the war.

As has been mentioned, international commissions are set up for the Elbe and the Oder comprising representatives of riparian and in each case of four non-riparian states. The representation of the non-riparian states is intended to protect the general interest of navigation. The well-known precedent is the European Commission of the Danube, the traffic on which in the past has been largely carried on under the flags of non-riparian states.

The two international commissions provided for the Elbe and the Oder are to draw up projects for the revision of existing agreements and regulations, subject to the general convention above mentioned, if it exists, or otherwise in conformity with the general clauses of the Treaty of Peace. In the meantime and subject, however, to the gen-



eral provisions of the Treaty of Peace, existing agreements and regulations are continued in force.

The special clauses regarding the Danube are provisional and not detailed in their nature. The powers of the European Commission of the Danube are reestablished, but that Commission is at present to consist of representatives only of Great Britain, France, Italy and Roumania. The European Commission is to receive an indemnity from Germany for damages inflicted during the war. The provisional administration of the remainder of the Danube is to be undertaken by another international commission, including both the riparian and non-riparian states.

The permanent régime for the Danube is to be laid down by a conference named by the Allied and Associated Powers to meet within one year<sup>3</sup> of the coming into force of the treaty, and this régime is accepted in advance by Germany, although permission is given for her representatives to be present at the conference.

Provision is made for the application of the general régime of equality to a deep draft Rhine-Danube canal, if one should be constructed hereafter. It is well known that this project has been discussed for years past, and is undoubtedly a possibility of the future, although in view of the financial situation, its construction, within any reasonable period of time, may well be doubted.

Perhaps the only one of the clauses regarding the Danube which is not provisional in its nature is that which assures to the three states of Czecho-Slovakia, the Serbs, Croats and Slovenes, and Roumania, the right to construct works along their frontiers of the river, subject to the approval of the International Commission, by granting them facilities on the opposite bank and also on the part of the bed which is outside their territory. It will be seen that a very similar provision in more elaborate form is granted to France in regard to the Rhine.

In connection with the Rhine, a legal question of great interest and of some difficulty at once arises. The navigation of the Rhine at present is governed by the Convention of Mannheim of October

<sup>3</sup> There is an understanding among the interested Powers that the Conference, will meet within three months of the coming into force of the treaty.

26, 1868 (and the agreements supplementary thereto), the parties to which were France, Prussia, Holland, Bavaria, the Grand Duchy of Baden and the Grand Duchy of Hesse. Holland could not be a signatory to the Treaty of Peace and yet was bound to Germany by the provisions of the Treaty of Mannheim. Any modification of the Treaty of Mannheim could, in the Treaty of Peace, be assented to only by Germany and not by Holland. It thus became obvious that while the assent of Holland must be subsequent to the Treaty of Peace, there must be a present assent of Germany to that future assent of Holland.

This arrangement is embodied in Article 354, the opening article of Chapter 3, Section 2, of which contains the clauses relating to the Rhine and the Moselle (Articles 354 to 362). By that article the Convention of Mannheim is continued subject to the conditions of the Treaty of Peace. Certain modifications, hereafter mentioned, are at once to be made in the Convention of Mannheim, which furthermore is to be revised within six months of the coming into force of the treaty. This revision is to be drawn up by the Central Commission set up for the Rhine and is to be approved by the Powers represented on that Commission, and Germany agrees in advance to adhere thereto. The legal difficulty regarding Holland is met by the provision that the Allied and Associated Powers will come to an understanding with Holland on the matter, and by the further clause giving Germany's accession in advance to that understanding.

A difficulty of a different nature arose in connection with the interest of Switzerland in the Rhine. Switzerland, as has been mentioned, was not a party to the Convention of Mannheim, and, of course, was not a party to the Treaty of Peace, having been a neutral. The interests of Switzerland being claimed, but not defined by any existing treaty, it was thought wise that her representatives should be heard, and the mention of Switzerland in the clauses relating to the Rhine is a result of that hearing.

The modifications as to the Convention of Mannheim are of two classes:

- (1) Certain detailed provisions mentioned in Article 356 are

modified in favor of free navigation, both of vessels and goods of all nations.

(2) The Central Commission for the Rhine is enlarged and reconstituted (Article 355), with nineteen members, of whom there will be appointed by France, 5 (including the president of the Commission); German riparian States, 4; Holland, 2; Switzerland, 2; Great Britain, 2; Italy, 2; Belgium, 2; and the headquarters of the Commission are to be at Strasburg.

As by the cession of Alsace-Lorraine, France once more becomes a riparian state on the Rhine, Article 357 provides for the cession to France by Germany of a portion of the German vessels and tugs, the amount of the cession and the credit therefor to be determined by an arbitrator appointed by the United States. Allusion may again be made to the necessity of such a provision in order to protect the interests of France and in particular those of Alsace-Lorraine. There is likewise prescribed a cession by Germany of a portion of her dock and warehouse interests at Rotterdam in order to provide terminal facilities for the French Rhine navigation.

The cession of these vessels and interests at Rotterdam is in the general interest, having the purpose of at once giving to the transportation system of Europe the opportunity of full and equal use; such cession is indeed analogous to the delivery of rolling stock in connection with the transfer of the territory within which a railway is located.

Special rights, chiefly for irrigation and power purposes, are given to France on the Rhine so far as her frontier extends along the river, subject to payment by France to Germany of the value of half the power produced and also payment for any real interests acquired on the right bank of the Rhine, and subject further to the prior right of navigability. These privileges were granted to the French largely because of the technical conditions surrounding the production of power on the Rhine at the present time and its possibilities in the future. It is impossible in this discussion to enter into those conditions in detail. It should be added that Article 358 also grants to Switzerland similar rights on her frontier, subject to the approval of the Central Commission on the Rhine.

Articles 359 and 360 may be regarded as supplementary to Article 358. They provide that, subject to the preceding clauses, all works in the bed of the Rhine, or on either bank along the Franco-German frontier, require the approval of the Central Commission. France may denounce or may be substituted for Alsace-Lorraine in agreements between Alsace-Lorraine and the Grand Duchy of Baden, and further, France shall have the right of having carried out such works as the Central Commission may regard as necessary for the navigability of the Rhine above Mannheim.

For some time past a project has been discussed of a canal between the Rhine and the Meuse. No agreement was ever reached in the matter between Belgium and Germany, chiefly because of a difference of view as to the point at which the canal should reach the Rhine. Provision is made in Article 361 that this canal may be built within twenty-five years at the option of Belgium, subject to the approval of the Central Commission on the Rhine, to which Commission is granted the power of determining the division of the cost of the initial construction. The canal, if built, is to be placed under the régime of the Central Commission.

It is the belief of the writer that this provision is a matter of protection to Belgium against traffic discrimination of various kinds, and that it is highly improbable that the result of the Article will be the digging of the canal.

German consent to the possible extension of the jurisdiction of the Central Rhine Commission to other parts of the Rhine system, both river and canal, is accorded in Article 362, subject to the further consent, when necessary, of Luxemburg and of Switzerland.

The foregoing discussion of the clauses regarding international rivers has necessarily been of a somewhat summary character. Careful and detailed study of these clauses will hereafter be required, in relation not only to the execution of the treaty itself, but also to the drafting of new conventions and to the international law of the future. The discussion here may well close by citing the admirable statement of the importance and purpose of these clauses, contained in the above-mentioned letter of Monsieur Clemenceau of June 16, 1919.

Arising out of the territorial settlement are the proposals in regard to international control of rivers. It is clearly in accord with the agreed basis of the peace and the established public law of Europe that inland states should have secure access to the sea along navigable rivers flowing through their territory. The Allied and Associated Powers believe that the arrangements which they propose are vital to the free life of the new inland states that are being established and that they are no derogation from the rights of the other riparian states. If viewed according to the discredited doctrine that every state is engaged in a desperate struggle for ascendancy over its neighbors, no doubt such an arrangement may be an impediment to the artificial strangling of a rival. But if it be the ideal that nations are to cooperate in the ways of commerce and peace, it is natural and right. The provisions for the presence of representatives of non-riparian states on these river commissions is security that the general interest will be considered.

Section III (Articles 365 to 375) is entitled "Railways." Certain articles—namely, Article 365 and Article 367 to Article 369—contain provisions which make applicable to German railways the principles of equality heretofore discussed in connection with transit and with navigation. Similarly these Articles are within the stipulations of Article 378 as to the period within which they shall remain in force without reciprocity and without revision by the Council of the League of Nations.

Article 366 revives the Berne Railway Convention of October 14, 1890, and subsequent agreements supplementary thereto, and in addition contemplates a new convention regarding railway transportation to be concluded within five years, to which convention Germany will be bound. The necessity of these clauses is apparent when it is remembered that the Berne Convention was by its terms to expire December 31, 1919.

Article 370, regarding rolling stock in general and railway brakes in particular, is not in terms made temporary, but it is nevertheless subject to Article 377 which permits the League of Nations to recommend the revision of *all* Articles relating to a permanent administrative régime.

The subject of rolling stock to be delivered in connection with railway systems in territory ceded by Germany is dealt with in Article 371. Commissions of experts on which Germany is to be represented

are to fix the proportion in certain cases. These same commissions, by Article 372, are, in the event of dispute, to fix the conditions of working in cases when, owing to frontier changes, "a railway connection between two parts of the same country crosses another country, or a branch line from one country has its terminus in another."

A special provision in favor of Czecho-Slovakia is found in Article 373.

Within a period of five years from the coming into force of the present treaty the Czecho-Slovak State may require the construction of a railway line in German territory between the stations of Schlauney and Nachod. The cost of construction shall be borne by the Czecho-Slovak State.

The two towns mentioned, Nachod in Czecho-Slovakia, and Schlauney (or Schlanei) in Germany, are about two and one-quarter miles distant from each other in a direct line. The chief purpose of the proposed rail connection is to facilitate the transport of coal from upper Silesia. The road to be built would probably be less than a mile in length, as the existing lines are at one point only about half a mile apart.

At the time of the construction of the St. Gothard Railway, Germany, by agreement with the Italian and Swiss Governments, made a contribution of twenty million francs toward its cost, pursuant to the Convention of October 13, 1909. The denunciation of this convention, after agreement between Switzerland and Italy on the subject, is contemplated by Article 374, and as such denunciation will probably involve the payment to Germany of a comparatively large sum, it is provided that any dispute as to the conditions shall be determined by an arbitrator designated by the United States.

The temporary provisions of Article 375 regarding transport, relate solely to the execution of the treaty and to the restoration of normal conditions.

It has been seen that Part XII of the treaty relates to subjects of a very technical nature, perhaps the most technical of any dealt with in the Treaty of Peace. In view of this, disputes regarding the meaning and effect of the clauses are almost certain to arise and provision for the determination of these disputes is essential. As

has already been seen, the decision of arbitrators in particular instances is laid down, but, in addition to this, Article 376 in general terms requires all disputes as to the interpretation and application of the preceding articles of Part XII to be settled as the League of Nations shall provide.

Article 379 is in part foreshadowed by previous clauses (e.g., Articles 338, 366), but emphasizes the thought that a general régime in international matters is contemplated, not a régime enforced upon Germany as the result of victory, but a régime to which all states, allies, enemies and neutrals shall be parties on an equal footing. General conventions regarding transit, waterways, ports and railways are to be concluded within five years "by the Allied and Associated Powers with the approval of the League of Nations," and to these conventions Germany will adhere.

The final articles of Part XII (380 to 386) relate to the Kiel Canal. This canal remains wholly within German territory and is left subject to German control. Built originally chiefly for military reasons, the regulations here considered for the Kiel Canal relate principally to commerce. The principle is again one of entire equality in regard to "all nations at peace with Germany." A Power at war with Germany will thus have no rights under the treaty, and if Germany is a neutral, vessels of war of the belligerents are on an equal footing by Article 380, subject of course to the rules of neutrality laid down by international law, some of which are codified in Convention XIII of The Hague of 1907.

There is no prohibition or regulation of the fortification of the canal.

The regulations regarding the use of the Kiel Canal are in principle based upon those generally provided for international rivers as to matters of equality, charges, transit and navigation.

A tribunal is to be instituted by the League of Nations to decide questions of the violation or interpretation of the articles relating to the canal, but a local authority is to be established at Kiel by Germany to deal with disputes in the first instance.

Popular interest is not ordinarily concerned with the general problems covered in the Treaty of Peace by the Ports, Waterways

and Railways clauses. The solution of these problems is, nevertheless, very important in the economic life of peoples, and it may well be that the future will point to these clauses as having contributed very materially to the maintenance of the peace of Europe. It may be too much to say that a beginning has been made toward the coöperative organization of Europe's communication and transportation system on a continental basis. During the discussions of the Commission, however, it was not infrequent to hear a comparison drawn between the Europe of the future and the United States of to-day, in the arrangement of interstate commerce. Some steps at least have been taken looking toward the creation in Europe of a kind of coöperation between various European states similar to that which we have achieved in the United States as the result of the interstate commerce clause of the United States Constitution.

DAVID HUNTER MILLER.



## THE SHANTUNG QUESTION

IN the great Province of Shantung lies the little village of Chefoo, the birthplace of Confucius, to which hundreds of thousands of Chinese make an annual pilgrimage. It is what Mecca is to the Mohammedan, Jerusalem to the Christian. Shantung is the Chinese sacred province, the place to be protected from foreign intrusion.

The questions raised by the Shantung sections of the treaty with Germany must be considered in the light of America's past relations with China and Japan's general Oriental policy. For nearly a century we have posed as the particular friend and guide of China. The Treaty of Peace, Amity and Commerce between the United States and China, proclaimed January 26, 1860, provided that, "if any other nation should act unjustly or aggressively [towards China] the United States will exert their good offices, on being informed of the case, to bring about an amicable arrangement of the question, thus showing their friendly feeling." China's first serious attempt to enter into voluntary relations with the Western world was under the guidance of American statesmen. For many years John W. Foster, a trained and experienced international lawyer and diplomat, acted as her legal and confidential adviser. We have sent her many devoted missionaries and professors who, in recent years, seem to have supplanted the jurists and statesmen as advisers and diplomatic experts.

The United States took no part in the scramble for territory and spheres of influence and refused concessions voluntarily tendered to her in Canton, Peking and Tientsin. She established the policy of the open door and has consistently refused to recognize the right of any nation to secure preferential trade privileges in any part of China.

When the Chinese rose in blind fury against the foreigners who were carving up their country and commenced to hack and slay indiscriminately friend and foe alike, the United States aided in

restoring order and punishing the guilty, and then used her influence to restrain those who sought vengeance in place of justice. Within a few years she released her share of the punitive indemnities, and China in gratitude appropriated the amount of the unpaid balance for the education of Chinese youth in America. China became a republic, and when the World War commenced she naturally looked to America for guidance. At the request of President Wilson she severed diplomatic relations with Germany and later declared war against the Central Powers and joined in the struggle in the name of democracy. Her war activities were restricted by Japan, and the United States refused her the financial aid so freely granted to other Powers which would have enabled her to make her enormous man power available. Nevertheless, approximately one hundred and fifty thousand of her sons were sent to France where they served principally as laborers back of the lines, thus releasing an equal number of men for use at the front. Distracted by internal dissensions, almost disintegrated by the penetrating activities of her powerful, skillful and aggressive neighbor and humiliated by demands and entangled in treaties signed under moral and physical duress, China sent a delegation to France to present her claims for consideration to the Peace Conference.

## I

When it was announced that the world was to be reorganized in accordance with the principles of justice, the Chinese very naturally desired to take advantage of the occasion to secure a revision of her treaties and a reconsideration and readjustment of her complicated foreign relations. Upon the advice of her American friends she abandoned this plan and elected to concentrate her efforts on the attempt to save Shantung from the Japanese.<sup>1</sup> The result was a bitter disappointment for the Chinese. The Council of Four recognized the justice of China's claims, but sustained the demands of Japan, and in the treaty, as signed and sent to the Senate, Germany renounces in favor of Japan—"all her rights, title, and privileges—

<sup>1</sup> *Hearings before the Senate Committee on foreign affairs. Statements of Dr. J. C. Ferguson, T. F. Millard, and C. F. Williams.*

*particularly those concerning the territory of Kiaochow, railways, mines and submarine cables—which Germany acquired in virtue of the treaty concluded by her with China on March 6, 1898, and of all other arrangements relative to the Province of Shantung.”*

A very remarkable situation developed at Paris. It appeared that early in 1917 Japan had secured promises from Great Britain, France, Russia, and Italy to support the demands which she intended to make at the Peace Conference to succeed to the German rights in Shantung. As President Wilson informed the Senate Foreign Relations Committee at the famous White House meeting, August 19, 1919, the representatives of Great Britain and France felt that they could not recede from these pledges—“that they were bound by them, but when they involved general interests such as they realized were involved, they were quite willing, and I think desirous that they should be reconsidered with the consent of the other party.” President Wilson and the entire American Commission and their advisers on Far Eastern affairs believed that the German rights and privileges in Shantung should be transferred and released to China. But the Japanese demand was presented at the proper psychological moment. President Wilson felt constrained to accede to the Japanese demands in order to secure the signature of Japan to the treaty and thus save the League of Nations. The action of the American Commission was determined by the President contrary to the advice of Secretary Lansing, General Bliss, Henry White, and all the American experts on the Orient,<sup>2</sup> because in his judgment, “it was the best that could be got, in view of the definite engagements of Great Britain and France.”<sup>3</sup>

Secretary Lansing informed the Committee that he believed that the Japanese delegates would have signed the treaty even though the demand for Shantung had been denied, and this seems to have been the opinion of everyone except the President and possibly Colonel House.<sup>4</sup>

The treaty as signed and submitted to the Senate contains no provisions with reference to the future disposition of the Shantung

<sup>2</sup> *Senate Hearings*, p. 549.

<sup>3</sup> *Ibid.*, pp. 531, 532.

<sup>4</sup> *Ibid.*, pp. 182, 531.

interests. The transfer to Japan is absolute, but President Wilson states that the representatives of Japan promised the Council of Four that if their demands were acceded to, Japan would, upon certain conditions and with designated reservations, convey to China what she acquires under Articles 156, 157, and 158. This statement of intentions, or promise, rests in parole, but it appears in substance in the secret *procès-verbal*, which however is not and probably never will be made a public record. The Chinese commissioners were not permitted to sign the treaty with reservations, and therefore did not sign.

The transfer of the German rights in Shantung to Japan is almost universally disapproved in America, and the feeling is strong that the President yielded unnecessarily to the demand of Japan, and consented to the perpetration of a moral wrong on an ally which had placed its faith in him and his country. This action, in connection with the Lansing-Ishii recognition of Japan's "special interests" in China, has strongly impressed the Chinese mind with the belief that the United States has abandoned the policy of the open door and acquiesced in Japan's claim of political and economic paramountcy in China. The opinion among all classes seems to be "that China has not only in this instance been forced to a specific act by one foreign nation, but that by the treaty for the first time a union of nations comes in to give sanction to a thing which she feels is wrong, and is an outrage on her sovereign rights. In every former instance where such concessions have been wrung from her the balance of power among nations has always made it possible that some Powers would come to her and say: 'We are sorry for you and we will help you out as much as we can.' In this instance China feels that she has been robbed of her rights in Shantung by one nation, originally by Germany, and those rights transferred to Japan, and that all the other nations have come along and have joined in approval of what seems to her an infamous act; and among those Powers that are approving it is the nation which she has always counted as her most disinterested friend."<sup>5</sup>

<sup>5</sup> Statement of Dr. J. C. Ferguson, official adviser to the President of China, to the *Senate Committee on Foreign Relations, Senate Hearings, etc.*, pp. 565-6.

On August 23 the Senate Committee on Foreign Relations, after hearing the statements of President Wilson, Secretary of State Lansing, and persons familiar with Far Eastern conditions, by an eight to seven vote, recommended that the Treaty of Peace be amended by striking out the word Japan where it appears in Articles 156, 157, and 158, and inserting in lieu thereof the word China.<sup>a</sup>

The following statements may be taken as fairly expressing the reasons which actuated the members of the committee in voting for an amendment which if accepted by the Senate requires that the treaty be sent back for further consideration by the other signatory powers. Said Senator Johnson of California:

One of the outstanding iniquities of the treaty, neither excused nor justified except upon the Prussian philosophy, was the Shantung question. Every American Commissioner, including the President, has condemned it. And every witness before the Foreign Relations Committee has denounced it. It presented, with none of the prejudices in dealing with an enemy, a clean cut moral issue. The members of the Foreign Relations Committee had to decide whether a friend and an ally should be despoiled upon the sole ground of expediency and fear, and they have decided for the right. All we could do was to disapprove an admitted wrong and fraud practiced upon a weak, friendly, defenseless people, and this we have done. It may be true, as asserted by our opponents, that we cannot remedy the wrong. At least we are not parties to it.

The Democratic senators opposed the amendment on the ground that such action at this time would not help China and might injure her chances ultimately to recover the province through the League of Nations. "If the treaty be rejected finally by us," said Senator Pomerene, "all opportunity for China to recover in this way will be ended. If we ratify the treaty Japan may be expected to restore it as she has promised."

Senator McCumber, a Republican, voted with the Democratic minority and issued a statement in explanation of his vote, which suggests that whatever Japan demands is sacrosanct and that the amendment of the treaty by the Senate in the exercise of its constitutional power would be an affront to a proud and high-spirited

<sup>a</sup> Included in the Report of the Committee, Sept. 10, 1919.

people, who are accustomed to have their own way in dealing with their neighbor. He said:<sup>7</sup>

I feel keenly about the Shantung amendment. If adopted by the Senate it could be nothing less than an affront to Japan, an absolutely useless affront. It stands to reason that Great Britain and France cannot acquiesce in it. If they did, Japan would refuse to ratify the treaty, and would not be in the League of Nations. In that event we would leave Japan and China to settle the dispute between themselves.

I voted against "the Shantung amendment" because under the covenant and treaty, as it stands, all the nations of the world, in joining it, agree no longer to rob China. For this and other reasons as good, I believe in the early ratification of the instrument, unchanged, because it substitutes justice for war in settling international disputes and righting international wrongs of which China has suffered many.

As to Shantung, my reasons for voting against the amendment were:

First—Japan has not yet a title to the territory. She holds it as part of the results of the war until its disposition is decided by this treaty.

Second—Japan has promised publicly in her treaty with China to surrender the leasehold right over this territory which Germany held under its treaty with China, not at some indefinite future time, not a thousand years hence, but as soon as Japan has acquired these rights under the pending treaty.

Third—Japan renewed this promise at Paris through its mission, and has repeated the promise to the President of the United States, who has every reason to believe that Japan will scrupulously keep her pledged word.<sup>7a</sup> I agree absolutely in this belief and faith of the President in the sincerity of Japan.

Fourth—If Japan should fail to keep the treaty with China, then under the preamble of the League, which provides that all joining it shall maintain "a scrupulous respect for all treaty obligations," China can go before the Council of the League, and all the nations of the world will unite to force Japan to surrender the territory to China.

<sup>7</sup> See also *Congressional Record* of Aug. 26, 1919.

<sup>7a</sup> See an article by J. T. Addison on *The Value of Japanese Promises*, in *The New Republic*, Sept. 17, 1919. Mr. Addison says: "Since the facts in this brief summary are all vouched for by Japan, it is difficult to avoid the conclusion that Japan seldom, if ever, keeps important international promises. In telling America so frequently that she does keep her promises, she is relying not on historical facts, but solely on our national ignorance of Far Eastern politics."

Fifth—If this treaty be amended as proposed in the matter of Shantung, Japan is deprived of the privilege of giving to China as the fruits of her victory the victorious possession of the rights held by Germany. By this course a proud and high-spirited people would be affronted. In the public opinion of Japan, opposition would be aroused by the manner in which it is proposed to force Japan to act, after its spontaneous promise to do right.

Then would arise a most serious situation. Japan would refuse to complete her membership in the League of Nations by refusing to ratify the treaty signed by her commissioners at Versailles, and would deal with China as one nation with another. In this event Japan would inevitably impose more severe conditions, which China would be powerless to resist. The only course then open would be to use force against Japan, and Japan would meet force with force.

The issues involved require a clear understanding of the extent and nature of the German rights and privileges in Shantung, the treaties between Japan and China relating thereto, and the Japanese promise to transfer what she may acquire to China.

## II

Germany is required to renounce generally and specifically all her extra-European possessions. The general clause of renunciation leaves the titles in the air, but Germany undertakes to recognize and conform to the measures which may be taken by the Powers in connection therewith. Generally it is provided<sup>8</sup> that,

In territory outside her European frontiers as fixed by the present treaty, Germany renounces all rights, titles and privileges whatever in or over territory which belonged to her or to her allies, and all rights, titles and privileges whatever their origin which she held as against the Allied and Associated Powers.

Specifically,

Germany renounces in favor of the Principal Allied and Associated Powers all her rights and titles over her oversea possessions,<sup>9</sup>

and declares that,

All movable and immovable property in such territories belonging to the German Empire or to any German State shall pass to the

<sup>8</sup> Art. 118.

<sup>9</sup> Art. 119.

government exercising authority over such territories, on the terms laid down in Article 257 of Part IX of the present treaty.<sup>10</sup>

These provisions, which refer to the former German colonies, are followed by articles which transfer German rights and interests in certain small states which participated in the war to the extent of their capacities, to such states. Thus all treaties, conventions and agreements between Germany and Siam, and all rights, titles and privileges derived therefrom, including all rights of extra-territorial jurisdiction, terminate as from July 22, 1917, and,

all goods and property in Siam belonging to the German Empire or to any German State, with the exception of premises used as diplomatic or consular residences or offices, pass *ipso facto* and without compensation to the Siamese State.<sup>11</sup>

So German property in Egypt passes to the Egyptian Government,<sup>12</sup> and that in the Sherifian Empire to the Maghzen without payment.<sup>13</sup> German state property in the British concessions in Canton is renounced in favor of the British Government and the property of the German school situated in the French concession at Shanghai goes conjointly to the French and Chinese Governments.<sup>14</sup>

Where Japanese claims were not involved, China was given the same consideration as Siam and the other minor belligerent states and protectorates. The specific advantages gained by China are:

1. The renunciation by Germany in her favor of all benefits and privileges resulting from the final Protocol signed at Peking on September 7, 1901, and from all annexes, notes and documents supplementary thereto, and of all claim to indemnities thereunder subsequent to March 14, 1917.<sup>15</sup>

2. After the treaty comes into force the high contracting parties will apply, in so far as concerns them respectively,

- (a) The arrangement of August 29, 1902, regarding the new Chinese Customs Tariff.

- (b) The arrangement of September 27, 1905, regarding Whang-poo and the provisional supplementary arrangement of April 4, 1912;

<sup>10</sup> Art. 120.

<sup>11</sup> Arts. 135, 136.

<sup>12</sup> Art. 153.

<sup>13</sup> Art. 144.

<sup>14</sup> Art. 134.

<sup>15</sup> Art. 128.



China is no longer required to grant to Germany the advantages or privileges which she allowed her under this arrangement.<sup>16</sup>

(c) The leases from the Chinese Government held under concessions at Hankow and Tientsin are abrogated, and upon regaining her full sovereign rights therein China declares her intention of opening the territory to international residence and trade.<sup>17</sup>

(d) The astronomical instruments which formed a part of the loot carried away by the German troops in 1901 are to be returned and installed at Peking.

(e) Subject to the Shantung provisions of the treaty, Germany cedes to China all the buildings, wharves and pontoons, barracks, forts, arms and munitions of war, vessels of all kinds, wireless telegraphy installations and other public property belonging to the German Government [except that used for diplomatic residences and consular premises or offices] which are situated or may be in the German concessions at Tientsin and Hankow or elsewhere in Chinese territory.<sup>18</sup> But the German property situated within the Legation Quarters at Peking may not be disposed of without the consent of the diplomatic representatives of the Powers which at the coming into effect of the Treaty of Peace remain parties to the Final Protocol of September 7, 1901.

(f) Germany waives all claims against the Chinese Government or against any Allied or Associated Government arising out of the internment of German nationals in China and their repatriation. She equally renounces all claims arising out of the capture and condemnation of German ships in China, or the liquidation, sequestration or control of German properties, rights and interests in that country since August 14, 1917. This provision, however, shall not affect the rights of the parties interested in the proceeds of any such liquidation which shall be governed by the economic clauses of the Treaty.<sup>19</sup>

<sup>16</sup> Art. 129.

<sup>17</sup> Arts. 130, 132.

<sup>18</sup> Art. 130.

<sup>19</sup> Art. 133.

## III

In the classification of subjects Shantung is treated as a separate topic. The Germans' rights, privileges and property are disposed of in the following articles:

## ARTICLE 156

Germany renounces, in favor of Japan all her rights, title and privileges—particularly those concerning the territory of Kiaochow, railways, mines and submarine cables—which she acquired in virtue of the treaty concluded by her with China on March 6, 1898, and of all other arrangements relative to the Province of Shantung.

All German rights in the Tsingtao-Tsinanfu Railway, including its branch lines, together with its subsidiary property of all kinds, stations, shops, fixed and rolling stock, mines, plant and material for the exploitation of the mines, are and remain acquired by Japan, together with all rights and privileges attaching thereto.

The German State submarine cables from Tsingtao to Shanghai and from Tsingtao to Chefoo, with all the rights, privileges and properties attaching thereto, are similarly acquired by Japan, free and clear of all charges and encumbrances.

## ARTICLE 157

The movable and immovable property owned by the German State in the territory of Kiaochow, as well as all the rights which Germany might claim in consequence of the works or improvements made or of the expenses incurred by her, directly or indirectly, in connection with this territory, are and remain acquired by Japan, free and clear of all charges and encumbrances.

## ARTICLE 158

Germany shall hand over to Japan within three months from the coming into force of the present treaty the archives, registers, plans, title-deeds and documents of every kind, wherever they may be, relating to the administration, whether civil, military, financial, judicial or other, of the territory of Kiaochow.

Within the same period Germany shall give particulars to Japan of all treaties, arrangements or agreements relating to the rights, title or privileges referred to in the two preceding articles.

Under the foregoing provisions of the treaty Japan can properly acquire neither more nor less than what Germany had when the war

commenced, and anything in the Province of Shantung permanently withheld by Japan from China *is taken from China*. The sacrifice and expenses incurred by Japan in expelling the Germans from Shantung, about which so much has been said, are properly chargeable against Germany or the Allies and not against China who was then a friendly neutral.

The transfer of German interests in Shantung to Japan instead of to the state from which they were acquired and in which the property is located constitutes an exception to the principle applied to all other German rights and interests outside of Germany.

#### IV

The rights, titles and privileges which under Articles 156, 157, and 158, Germany renounces in favor of Japan are such as she acquired under the treaty of March 6, 1898, and "other arrangements" relating to the Province of Shantung. Shortly before that date, while searching for a military and commercial base in China, Germany had selected Kiaochow Bay as the most desirable unappropriated port, and while on a visit to St. Petersburg the German Emperor had induced the Czar to agree that Russia would not object to the proposed acquisition.<sup>20</sup> The opportune incidental killing of two German missionaries during a local riot in a village in the province furnished the pretext for action, and Kiaochow was taken possession of by vessels of the German navy. At that time, when Germany was looking for colonies, missionaries were listed by her at a high price, and for these two China was required to pay well in territory and economic privileges. No one questions that the treaty of March 6 was secured by duress and under circumstances which in private law render contracts between individuals voidable.

As observed by Sir John Macdonell, "Almost all the treaties concluded for some years with China, and indeed until recently, belong

<sup>20</sup> Dr. E. J. Dillon (*The Eclipse of Russia*, Chap. XIII) gives an interesting account of the way in which the Kaiser secured this promise as narrated to him by Count Witte. Count Mouravieff, the Minister for Foreign Affairs, told Witte that the German Emperor and the Czar at that time arranged between themselves for the seizure of Kiaochow by Germany and Port Arthur by Russia.

to the class known to jurists as *iniquum fœdus*, the imposed treaty; they are not spontaneous agreements freely entered into by the parties. Some of them are rather of the nature of what Roman jurists call *deditio*.<sup>21</sup> In international practice such treaties are common and are recognized as valid with the implication and expectation that they will be repudiated whenever the injured state has acquired the military power necessary to make the renunciation effective. China has never been in that fortunate condition, and when the war commenced Germany's interests in the Province of Shantung stood unquestioned in law. The claim that all China's conventions and agreements with Germany were abrogated by her declaration of war seems to have received slight consideration. Nor did she have an opportunity to be heard on the proposition that as the sovereignty over the leased territory was retained in China, the territory was at least *quasi* neutral and not legally subject to capture by Germany's enemies.

Full knowledge of the exact terms of the convention of March 6, 1898, between China and Germany is so important to an understanding of the question that, with the exception of formal parts, it is quoted in full. After the usual insincere and complimentary recitals in which the Imperial Chinese Government expresses its grateful appreciation of the assistance rendered by Germany in connection with the mission in the prefecture of Tsao-chow-fu in Shantung, it is provided:<sup>22</sup>

*Section I.—Lease of Kiaochow.*

Article 1. His Majesty the Emperor of China, guided by the intention to strengthen the friendly relations between China and Germany, and at the same time to increase the military readiness of the Chinese Empire, engages, *while reserving to himself all rights of sovereignty* in a zone of 50 kilometres (100 Chinese li) surrounding the Bay of Kiaochow at high water, to permit the free passage of German troops within this zone at any time, and also in taking any measures, or issuing any ordinances therein, to previously consult and secure the agreement of the German Government, and especially to place no obstacle in the way of any regulation of the watercourses

<sup>21</sup> Prefatory Note to Dr. Tyau's *The Legal Obligations Arising out of Treaty Relations between China and Other States* (1917).

<sup>22</sup> Rockhill's *Treaties and Conventions With or Concerning China and Korea, 1894-1904*; also printed in *Senate Hearings*, pp. 583-590.

which may prove to be necessary. His Majesty the Emperor of China, at the same time, reserves to himself the right to station troops within this zone, in agreement with the German Government, and to take other military measures.

Art. 2. With the intention of meeting the legitimate desire of His Majesty the German Emperor, that Germany like other Powers should hold a place on the Chinese coast for the repair and equipment of her ships, for the storage of materials and provisions for the same, and for other arrangements connected therewith, His Majesty the Emperor of China leases to Germany, *provisionally for ninety-nine years, both sides of the entrance to the Bay of Kiaochow*. Germany engages to construct, at a suitable moment, on the territory thus leased fortifications for the protection of the buildings to be constructed there and of the entrance to the harbor.

Art. 3. In order to avoid the possibility of conflicts, the Imperial Chinese Government will not exercise *rights of administration in the leased territory* during the term of the lease, but grants the exercise of the same to Germany, within the following limits:

1. On the northern side of the entrance to the bay:

The peninsula bounded to the northeast by a line drawn from the northeastern corner of Potato Island to Loshan Harbor.

2. On the southern side of the entrance to the bay:

The peninsula bounded to the southwest by a line drawn from the southwesternmost point of the bay lying to the southsouthwest of Chiposan Island in the direction of Tolosan Island.

3. The Island of Chiposan and Potato Island.

4. The whole water area of the bay up to the highest watermark at present known.

5. All islands lying seaward from Kiaochow Bay, which may be of importance for its defence, such as Tolosan, Chalienchow, etc.

The high contracting parties reserve to themselves to delimit more accurately, in accordance with local traditions, the boundaries of the territory leased to Germany and of the 50 kilometre zone round the bay, by means of commissioners to be appointed on both sides.

Chinese ships of war and merchant vessels shall enjoy the same privileges in the Bay of Kiaochow as the ships of other nations on friendly terms with Germany; and the entrance, departure and sojourn of Chinese ships in the bay shall not be subject to any restrictions other than those which the Imperial German Government, in virtue of the rights of administration over the whole of the water area of the bay transferred to Germany, may at any time find it necessary to impose with regard to the ships of other nations.

Art. 4. Germany engages to construct the necessary navigation signs on the islands and shallows at the entrance of the bay.

No dues shall be demanded from Chinese ships of war and merchant vessels in the Bay of Kiaochow, except those which may be

levied upon other vessels for the purpose of maintaining the necessary harbor arrangements and quays.

Art. 5. Should Germany at some future time express the wish to return Kiaochow Bay to China *before the expiration of the lease*, China engages to refund to Germany the expenditure she has incurred at Kiaochow and convey to Germany a more suitable place.

Germany engages at no time to sublet the territory leased from China to another Power.

The Chinese population dwelling in the leased territory shall at all times enjoy the protection of the German Government, provided that they behave in conformity with law and order; unless their land is required for other purposes they may remain there.

If land belonging to Chinese owners is required for any other purpose, the owner will receive compensation.

As regards the reestablishment of Chinese customs stations which formerly existed outside the leased territory but within the 50 kilometre zone, the Imperial German Government intends to come to an agreement with the Chinese Government for the definite regulations of the customs frontier, and the mode of collecting customs duties in a manner which will safeguard all the interests of China, and proposes to enter into further negotiations on the subject.

### *Section II.—Railways and Mines.*

ARTICLE 1. The Chinese Government sanctions the construction by Germany of *two lines of railway in Shantung*. The first will run from Kiaochow to Chinan and the boundary of Shantung Province via Weihsien, Tsingchow, Poshan, Tzechwan and Tsowping. The second line will connect Kiaochow with Ichow, whence an extension will be constructed to Chinan through Laiwu-Hsien. The construction of the line from Chinan to the boundary of Shantung Province shall not be begun till after the completion of the construction of the line to Chinan, so that a further arrangement may be made with a view to affecting a connection with China's own railway system. What places the line from Chinan to the provincial boundary shall take in *en route* shall be specified in the regulations to be made separately.

Art. 2. In order to carry out the above-mentioned railway work a Chino-German Railway Company shall be formed with branches in one or more places, and in this company both German and Chinese merchants shall be at liberty to raise the capital and appoint directors for the management of the undertaking.

Art. 3. All arrangements for the above purposes shall be determined in an additional agreement to be concluded by the high contracting parties as soon as possible. China and Germany will settle this matter by themselves, but the Chinese Government will accord

favorable treatment to the said Chino-German Railway Company in constructing and operating the above-mentioned lines and extend to them other privileges enjoyed by Chino-foreign companies established in other parts of China.

The above article is conceived only in the interest of commerce: it has no other design. Positively no land or territory in the Province of Shantung may be annexed in the construction of the above-mentioned railways.

Art. 4. In the vicinity of the railways to be built, within 30 li of them, as, for instance, in Weihsien and Poshan Hsien on the northern line from Kiaochow to Chinan and as in Ichow Fu and Laiwu Hsien on the southern line from Kiaochow *via* Ichow to Chinan, German merchants are permitted to excavate coal, etc. The necessary works may be undertaken by Chinese and German merchants combining the capital. The mining regulations shall also be subsequently negotiated with care. The Chinese Government will, according to what has been stipulated for in the provision concerning the construction of railways, also accord favorable treatment to the German merchants and workmen, and extend to them other privileges enjoyed by Chino-foreign companies established in other parts of China.

This article is also conceived only in the interests of commerce, and has no other design.

### *Section III.—Affairs in the Whole Province of Shantung.*

If within the Province of Shantung any matters are undertaken for which foreign assistance, whether in personnel or in capital, or in material, is invited, China agrees that the German merchants concerned shall first be asked whether they wish to undertake the works and provide the materials.

In case the German merchants do not wish to undertake the said works and provide the materials, then as a matter of fairness China will be free to make such other arrangement as suits her convenience.

It will be noted that it is specifically stated that China while agreeing not to exercise rights of administration, reserves all rights of sovereignty in the leased territory and that Germany engages at no time to sublet the territory leased from China to another Power.<sup>23</sup> Her rights and privileges were not transferable.

Subsequent agreements were made for the purpose of making

<sup>23</sup> "The translation of the Chinese text of the Treaty explicitly states that Germany promises forever—the two Chinese characters are Yung Yuan, which mean forever—promises forever never to transfer this lease to any other power." J. C. Ferguson, *Senate Hearings*, p. 583.

these grants effective, but they did not materially increase the rights or privileges, granted in the March 6 treaty. On March 21, 1900, detailed arrangements were made respecting the organization, operation and administration of the Kiaochow-Chinan Railway and regulating the relations between the company and its operatives and the local inhabitants.

Article 4 of the original convention authorized the Germans in connection with Chinese and other joint capital to construct the necessary works and to mine coal, etc., within 30 li (15 kilometers) of the railways to be built, under regulations to be subsequently "negotiated with care." In July, 1911, an agreement was entered into between the provincial authorities of Shantung and the Chino-German Mining Company which delimited the mining areas. Article 3 (3) provided that:

Should the Chinese Government and merchants be short of capital for the exploitation of the mines in the districts relinquished to China by this agreement, they shall approach German capitalists for loans. If foreign materials and machinery are needed they shall purchase them from Germany. If foreign engineers are to be employed they shall engage German engineers.

Under these various conventions and agreements Germany acquired a ninety-nine-year lease of Kiaochow Bay and its vicinity, in all comprising about 400 square miles, back of which was a neutral zone of some 2,500 square miles. While reserving sovereignty over all this territory, the Chinese Government granted the exercise of the rights of administration to Germany during the period of the lease. The economic rights were limited to the construction of two lines of railroads in the Province of Shantung, the right to open mines within a specified distance of the railroads and a guaranty that in the event that China proceeded to develop the province with the assistance of foreign capital and material she should first apply therefor to the Germans.

At first the Germans showed a disposition to assert themselves politically, but this attitude was soon abandoned. After 1905 when the German troops were withdrawn they "handed over the post office to the Chinese, they made an agreement whereby the Chinese



Customs Administration was to function at Tsingtau much as elsewhere in China—with the special provision that twenty per cent of the duties collected be contributed toward the expenses of the local Tsingtau administration—and they began to employ Chinese in various capacities.”

Tsingtau was made a free port and Secretary John Hay on September 6, 1899, wrote to Von Bulow expressing his gratification at the liberal policy which had been pursued. The Germans and Chinese seem to have worked together very satisfactorily. The Chinese Government voluntarily opened commercial posts at Tsinan-fu, the provincial capital, Weihsien, and Chantsun. At Tsinan-fu, roads and drains were constructed by the Chinese while other public works were under the supervision of a joint Chinese and foreign commission. The provincial capital became “an important and attractive commercial and residential center wherein the Chinese and foreigners, the latter mostly German business men, have gotten on most agreeably and to mutual profit.”

Tsingtau the Germans made into one of the most attractive cities of the Far East. The railway proved reasonably profitable, but the mining company was not a great success and shortly before the war its shares were acquired by the railway company. In 1913 a new agreement was made for the construction of two new railway lines to be Chinese owned but German financed. A recent fair-minded writer says:<sup>24</sup>

Since the original seizure of Kiaochow the Germans had made no additional attempt to extend their territorial holdings or special privileges in China. They had not undertaken to extend their *administration* over Shantung—or even over the railway zone. The Shantung Railway Company had never attempted to assume a political status and perform political functions. The German Government had not sought to stretch the terms of the convention of 1898. There had been no creating of issues and demanding of immediate settlement such as has characterized the progress of the Japanese in Manchuria. German subjects had not exceeded their plainly stipulated rights; they had not invaded the interior, they had not become engaged in personal and police conflicts with the Chinese. There was in the later years of German presence in Shantung little of which

<sup>24</sup> Hornbeck, *Contemporary Politics in the Far East*, p. 298.

from the point of view of the Open Door policy, complaint could be made. For ten years past the Germans had done practically nothing calculated to complicate the politics of the Far East and except commercially they disturbed no peace in the Far East but the peace of mind of Japanese expansionists. Judged upon the basis of substantial accomplishments, successful and just administration, and real contribution to the economic and social welfare of the people who fell within the range of their influence, none of the Powers holding bases on the China coast can offer better justification for its presence than could the Germans.

The German seizure of Kiaochow suggested the necessity for prompt action by other Powers who thought they saw the beginning of the end of the Celestial Empire. Russia immediately demanded and secured, "by way of compensation," a lease of the Liaotung Peninsula, including the ports at Port Arthur and Talien-wan, for twenty-five years from March 27, on terms similar to those under which Kiaochow had been leased to Germany. On July 1, Great Britain secured Wei-hei-wei on the Gulf of Pechili, to be held, "for so long a period as Port Arthur shall remain in the occupation of Russia," at the time notifying Germany that in occupying Wei-hei-wei she had no intention of infringing German rights in Shantung. Great Britain obtained also an extension of the Kowloon area which was necessary for the military protection of Hong-kong. On April 10 France secured a lease of the Bay of Kwang-chau on terms similar to the German Kiaochow lease, the right to build a railway to Yunnan-fu, and a pledge that no portion of China south of the Yangtse Valley would be alienated unless to France. Great Britain received assurances that no concessions other than to herself would be made in the Yangtse Valley, and Japan, after in April requiring a statement from China that she never intended to cede or lease Fukien "to any Power whatsoever," in June compelled acceptance of a demand that settlements be established immediately at six specified places therein for the exclusive use of Japan. But at last the worm turned and the demand of Italy for a lease of Sanmen Bay on the Chekiang coast was abruptly refused. The Italian minister sent an ultimatum which was ignored and "his government, after some confusion, concluded by declaring that it did not care to

press the matter as Sanmen was not a good port and really not worth bothering about. The ripe grapes had apparently all been gathered."<sup>25</sup>

The vigorous old Empress Dowager now locked the Emperor in his palace, appealed to the Viceroy and Governors to resist further aggression and the Boxer troubles resulted.

# V

Great Britain and the United States had encouraged China to open her doors to foreign trade on equal terms to all. The scramble for concessions which culminated in the Boxer uprising placed this policy in danger and in September, 1899, Secretary Hay directed the American representatives at Paris, London, Berlin, St. Petersburg, and Tokio to express to the several governments his hope that they would join in making "formal declaration of an open door policy in the territories held by them in China."<sup>25a</sup>

Favorable replies were received from all the governments addressed, and on March 20, 1900, Secretary Hay announced that the seven great Powers had by formal affirmations pledged themselves to the open door policy. It has been frequently reaffirmed,<sup>26</sup> and

<sup>25</sup> Hornbeck, *Contemporary Politics in the Far East*, p. 229.

<sup>25a</sup> Thayer's *Life and Letters of John Hay*: Vol. 2, p. 242. "I was instructed," says Dr. Andrew D. White, "to secure, if possible, the assent of the German Government, which after various conferences at the Foreign Office and communications with the Minister of Foreign Affairs, some more, some less satisfactory, I was at last able to do. The assent was given very guardedly, but not the less effectively. Its terms were that Germany, having been from the first in favor of equal rights to all nations in the trade of China would gladly acquiesce in the proposed declaration if the other powers concerned would do so. The Emperor William himself was even more open and direct than his minister. At a dinner to the Ambassadors, in the spring of 1900, he spoke to me very fully on the subject, and in a conversation which I have referred to elsewhere, assured me of his complete and hearty concurrence in the American policy, declaring. 'We must stand together for the open door.'" *Autobiography*, Vol. 2, p. 158.

<sup>26</sup> See Secretary Hay's circular of July 3, 1900, the Root-Takahira Agreement of November 30, 1908, the Lansing-Ishii Agreement of November 6, 1917, the Anglo-Japanese Alliance Treaty of August 12, 1905, and July 3, 1911, the Franco-Japanese Arrangement of July 10, 1907, and the Convention between Japan and Russia of July 30, 1907.

no one of the Powers has ever repudiated it, although Russia and Japan have violated it in practice. Japan had so frequently given assurance of her adherence to the policy of the integrity of the sovereignty and territory of China that she attached little importance to its reaffirmance in the Lansing-Ishii Agreement.

Upon the outbreak of the war China took a position which would have been impregnable had she been a free international state. After formally declaring her neutrality she proposed that all her territory leased to belligerent Powers should be neutralized and that if war had to be waged on her territory, following the precedent of the Russo-Japanese War, belligerent acts should be limited to a specified region. It appears that the German and British representatives in China were satisfied with this proposal and that the American Minister was ready to initiate the steps necessary to carry it into effect. But Japan objected and took control of the situation by issuing an ultimatum to Germany in which she assumed paramountcy over China by ordering the Germans out of Chinese as well as Japanese waters.

China offered to take Kiaochow from the Germans if the Allies would permit it, and upon this being refused proposed to send troops to participate in the operations of the British and Japanese forces against Tsingtau. This also was denied. The military operations against Tsingtau did not require the occupation of territory outside of the German zone about Kiaochow, but the Japanese, in utter disregard of Chinese neutrality, landed their troops at Lungkow, some 150 miles away, and went overland. They seized the 256 miles of railway between Tsingtau and the provincial capital and assumed full control of all the telegraphs, telephones and post-roads.

Tsingtau was captured November 7, 1914, and from that time to the present Japan has been in full control of the district, although legally her position is merely that of a military occupant of conquered territory, pending its final disposition by the treaty of peace. But Japan seems to have proceeded on the theory that by the conquest she acquired full ownership and sovereignty over Kiaochow and control over Shantung.

China's potential value as an ally was fully appreciated by the European Powers. A few days after the capture of Kiaochow the

British and French Ministers proposed to Viscount Ishii that China should declare war against Germany and join the Allies. There is no official statement of what occurred at the meeting in which this proposal was made, but it is said on good authority that Ishii objected to China becoming a belligerent on the grounds that Japan's interests in China were paramount and that she must maintain a firm hand regarding them. "Moreover," he is reported to have said, "Japan cannot view without apprehension the prospect of a large Chinese army such as would be required if she participated actively in the war and cannot view without uneasiness a moral awakening of four hundred million Chinese."<sup>27</sup> According to one writer,<sup>28</sup> Viscount Ishii said that "Japan could not fail to regard with uneasiness a liberation of the economic activities of a nation of four hundred million people."

It is perfectly clear that Japan now took advantage of the occasion to establish her control over China. On the surface the relations between the two countries were friendly. No controversies were pending when on January 18, 1915, Japan presented the now famous twenty-one demands to the President of China with notice that they must be accepted promptly *and in the meantime kept secret*. Neither injunction was obeyed. When the fact that such outrageous demands had been made was published Japanese representatives abroad were instructed to deny everything. The Japanese Minister at Tokio denied officially that any demands whatever had been made, and even after copies were in the possession of foreign governments Japan denied that there were twenty-one of them and published a list of eleven demands, omitting the most objectionable of the original twenty-one. It is needless to say that such disingenuous conduct created a very bad impression on the world, which was heightened subsequently by the way in which the Lansing-Ishii Agreement was handled by Japan.

The time for presenting these demands was well chosen. The Allied Powers were fully occupied and in no position to raise a serious issue with Japan over her relations with China. Japan presented an

<sup>27</sup> Japan in Action, by Jeremiah W. Jenks, *N. Am. Rev.*, Sept., 1919.

<sup>28</sup> Millard, *Democracy and the Eastern Question*, p. 99.

ultimatum. Without substantial support China was forced to yield and signed a treaty which included the agreement to approve whatever arrangements Japan should make with Germany in reference to Shantung. All she could do was to issue a statement in which the demands and negotiations were summarized.

In considering the nature of the course they should take with reference to the ultimatum, the Chinese Government was influenced by a desire to preserve the Chinese people as well as the large number of foreign residents in China from unnecessary suffering, and also to prevent the interests of friendly Powers from being imperiled.

The Chinese Government understanding that some of the provisions of this treaty were in violation of her engagements with other Powers, threw the responsibility therefor upon Japan by the statement that,

In complying the Chinese disclaim any desire to associate themselves with any revision which may thus be effected of the various conventions and agreements with other Powers in respect of the maintenance of China's territorial independence and integrity, the preservation of the *status quo* and the principle of equal opportunity for the commerce and industry of all nations in China.<sup>29</sup>

On the day the treaty was signed, Mr. Bryan, as Secretary of State, gave to the press a statement from which the following is quoted:

At the beginning of negotiations the Japanese Government confidentially informed this Government of the matters which were under discussion and accompanied the information by the assurance that Japan had no intention of interfering with either the political independence or territorial integrity of China, and that nothing that she proposed would discriminate against other Powers having treaties with China or interfere with the "open door policy" to which the leading nations are committed.

On May 11, 1915, the United States Government sent the following note to China and a copy thereof to Japan:

In view of the circumstances of the negotiations which have taken place and which are now pending between the Government of China

<sup>29</sup> Millard, *Democracy and the Eastern Question*, App., pp. 382-394. This official statement is printed in full in *Senate Hearings*, pp. 600-606.

and the Government of Japan and of the agreements which have been reached as a result thereof, the Government of the United States has the honor to notify the Government of the Chinese Republic that it cannot recognize any agreement or undertaking which has been entered into or which may be entered into between the Governments of China and Japan impairing the treaty rights of the United States or its citizens in China, or the international policy relative to China known as the open door policy.<sup>29a</sup>

During the following two years Japan was active in consolidating her political and commercial position in Shantung.

The very evident disinclination of the Powers to support her in the diplomatic struggle with Japan had served to cool China's enthusiasm for the Allies, and when the United States asked her to sever diplomatic relations with Germany, she hesitated. Japan had been persistently holding before her the idea that Germany might win and that Japan and Germany might then come together as Russia and Japan had done after their war. In an interview with President Li Yun Hung, the Japanese Minister urged the risk to China involved in following the lead of an ineffective military Power like the United States which would not be able, even if willing, to do much for her. China's faith in the actual value of America's friendship had been very greatly shaken, and she asked for the formal assurance that if she broke with Germany, contrary to the advice of Japan, the United States would support her claim to Shantung as against Japan at the Peace Conference. Unfortunately just at that time the cables were not working and the American Minister was unable to communicate with Washington. Nevertheless, in line with the general policy of his government, Minister Reinsch, on his own judgment, assured China that the required support would be given. Thereupon China, over the protest of Japan, severed diplomatic relations with Germany and later followed America into the war.

The United States became a belligerent in April, 1917, and on August 14, China declared war and joined the Allies. There can be

<sup>29a</sup> For a critical study of these treaties see George Bronson Rea's Pamphlet entitled *Analysis of the China-Japanese Treaties*; Hornbeck's *Contemporary Politics in the Far East*, Chap. XVII; Millard's *Our Eastern Question*, Chaps. VIII and IX; Putnam Weale's *The Fight for the Republic of China*, Chaps. VI and VII.

no reasonable doubt that America induced her to enter the war. President Wilson says<sup>30</sup> that "We advised her to enter, and she soon after did. She had sought our advice. Whether that was the persuasive advice or not, I don't know." If there was any uncertainty, it was cleared up by the testimony of Dr. Ferguson:<sup>31</sup>

I might say that I was one of the persons who communicated that request on behalf of the minister to the Chinese Government. . . . It was at the request and on the continual urging of the United States officials at Peking that China entered the war.

Just what promises if any were made to China at that time is not so clear. President Wilson's statements with reference to the matter, like that quoted above, lack something possibly in frankness. He told the Senate Committee that although the United States made no promise to China that if she would enter the war we would protect her interests at the Peace Conference, China "knew that we would as well as we could. She had every reason to know it."<sup>32</sup>

Dr. Ferguson says:<sup>33</sup>

I never heard officially of any such statements, though I am cognizant of the fact that the United States promised China . . . to support China in her claim to be represented at the Peace Conference. There was doubt as to whether China would be given a seat in the Peace Conference previous to her entering into the war, and I know that the United States promised to use her best offices to secure a seat for China, even before she had entered the war, in view of this Kiaochow incident.

President Wilson, in a speech at St. Louis and again at San Francisco on September 17, 1919, said that "before we got into this war, but after the war had begun, because they deemed the assistance of Japan in the Pacific indispensable, Great Britain and France both agreed *that if Japan would enter the war* she could do the same thing with regard to Shantung that she had done with regard to Port Arthur,—that if she would take what Germany had in Shantung she could keep it." The fact is that Japan entered the war on August 14, 1914, and captured Shantung on November 7, 1914.

<sup>30</sup> *Senate Hearings*, p. 528.

<sup>31</sup> *Ibid.*, p. 578.

<sup>32</sup> *Senate Hearings*, p. 528.

<sup>33</sup> *Ibid.*, p. 579.



The promises by the European Powers to support Japan's claims to Shantung were made *in the early part of the year 1917*. On February 8, 1917, M. Krupensky, the Russian Ambassador, in a dispatch from Tokio thus described his efforts to induce Japan to withdraw her opposition to China's entry into the war:

On the other hand, the minister pointed out the necessity for him, in view of the attitude of Japanese opinion on the subject, as well as with a view to safeguard Japan's position at the future Peace Conference if China should be admitted to it, of securing the support of the Allied Powers to the desires of Japan in respect of Shantung and the Pacific Islands. These desires are for the succession to all the rights and privileges hitherto possessed by Germany in the Shantung Province. . . . Motono plainly told me that the Japanese Government would like to receive at once the promise of the Imperial (Russian) Government to support the above desires of Japan. In order to give a push to the *highly important question of a break between China and Germany* I regard it as very desirable that the Japanese should be given the promise they ask.

The promises which form a part of the secret treaties were given by Russia on February 20, by Great Britain on February 16, France March 1, 1917, and on March 29 the Italian Minister of Foreign Affairs verbally assured Japan that, "the Italian Government had no objection regarding the matter."<sup>34</sup>

Thus the four Allies bribed the fifth to consent to the entry of a new ally by agreeing to support the reluctant one in her claim to a portion of the new ally's territory.

According to her official statements, Japan entered the war because required to do so by her treaty with Great Britain. However, on July 4, 1917, in a speech at Boston, Viscount Ishii told his American audience that Japan was not obliged to enter the war by the terms of her alliance with Great Britain, but had done so in order to aid in making the world safe for democracy. If she entered the war for either reason it was not necessary for Great Britain and France to bribe her to keep her treaty obligation or perform her duty to humanity.

China's motives were in a sense "selfish," just as were those of

<sup>34</sup> *Cong. Record*, July 25, 1919, p. 3304.

some of her associates. She was in danger of being isolated and abandoned to the tender mercies of her neighbor, and joined the Allies with the hope of escaping from the burden of the German and Austrian indemnities, regaining the German concessions at Hankow, Tientsin, and Kiaochow and securing a favorable revision of existing treaties.

The Balfour and Viviani Missions which visited Washington immediately after the United States entered the war did not inform the American authorities of the agreements with Japan with reference to Shantung, nor did the Japanese Mission which came in August throw any light on these arrangements. Secretary Lansing did not know when he was negotiating with Ishii in October and November, 1917, that in the previous February or March Japan had secured assurances of support from the Powers in the Shantung matter.<sup>35</sup> Ishii did tell him in 1915 and again just after the signing of the Lansing-Ishii notes, that it had been practically agreed between him and Sir Edward Grey that the line of the equator should divide the British and Japanese acquisitions.<sup>36</sup>

The Lansing-Ishii agreement did not mention Shantung or Kiaochow, but it is extremely important as illustrating Japanese ambitions and methods and the construction she will place on her promises with reference to Shantung. The object of the Ishii Mission, as outlined in a confidential memorandum said to have been forwarded to the State Department before the arrival of the Mission,<sup>37</sup> was to convince the United States that,

Japan has no ulterior motive in respect to the integrity of China; that she adheres to her open door pledges; that nothing subversive of China's integrity is contemplated; that Japan's sole object is, by means entirely pacific, to bring order out of chaos in China with no special privileges in view; that Japan understands China better than any other nation, and, *owing to her geographic proximity and special political position and interests in the Far East*, she should therefore,

<sup>35</sup> *Senate Hearings*, p. 193.

<sup>36</sup> *Ibid.*, p. 219.

<sup>37</sup> Statement by Dr. J. W. Jenks, in the article entitled *Japan in Action*, *N. Am. Rev.*, Sept., 1919.

when essential, take the leading rôle in dealing with China as the United States does with the nations of the Western Hemisphere.

The Mission was, from the Japanese point of view, very much a success. By formal diplomatic notes dated November 2, 1917, Secretary Lansing and Viscount Ishii announced that,

The Governments of the United States and Japan recognize that territorial propinquity creates special relations between countries, and, consequently the Government of the United States recognizes that Japan has special interests in China, particularly in that part to which her possessions are contiguous. The territorial sovereignty of China remains, nevertheless, unimpaired and the Government of the United States has every confidence in the repeated assurances of the Japanese Government that, while geographical position gives Japan such special interests, they have no desire to discriminate against the trade of other nations or to disregard the commercial rights heretofore granted by China in treaties with other Powers.

It was agreed that the notes should be given simultaneous publication in Washington and Tokio at a given hour on November 7. This would give time for the two governments to communicate the official text of the notes to their representatives at Peking and elsewhere. In violation of this agreement, on November 4 the Japanese Ambassador at Peking handed copies in Japanese with Chinese translations to the Chinese Foreign Office, and on the same day kindly furnished the American Minister with a copy in English. The situation was complicated by the fact that the Chinese and Japanese translations converted the English words "special interests" into the equivalent of *vested interests*, *suzerainty*, or *proprietaryship*, and the Japanese press immediately informed the public that Japan's overlordship in China had been conceded by the United States. The fact, that the first information of the Lansing-Ishii agreement was conveyed to China and even to the American Minister by Japan suggested naturally that in doing this she was simply exercising an admitted right to "take the leading rôle in China."

The Chinese translation made by the experts connected with the American Legation conveys the meaning which "special interests" carries in English. The Japanese still claim that their translation is correct.

After learning of what had occurred at Peking, the State Department gave out copies of the notes with an explanatory statement which declared that they,

not only contain a reaffirmation of the "open door" policy but introduce a principle of non-interference with the sovereignty and territorial integrity of China which generally applied is essential to perpetual international peace, as clearly declared by President Wilson and which is the very foundation also of Pan-Americanism as interpreted by this government.<sup>38</sup>

Secretary Lansing gave the Senate Committee the following interesting account of the negotiations which led to the Lansing-Ishii Agreement.<sup>39</sup>

I suggested to Viscount Ishii that it would be well for the two governments to reaffirm the open door policy, on the ground that reports were being spread as to the purpose of Japan to take advantage of the situation created by the war to extend her influence over China—political influence. Ishii replied to me that he would like to consider that matter, but that, of course, he felt that Japan had a special interest in China, and that that should be mentioned in any agreement that we had; and I replied to him that we, of course, recognized that Japan, on account of her geographical position, had a peculiar interest in China, but that it was not political in nature, and that the danger of a statement of special interest was that it might be so construed, and therefore I objected to making such a statement.

At another interview we discussed the phrase "special interests," which the Japanese Government had been very insistent upon, and which, with the explanation I have made, I was not very strongly opposed to, thinking that the reaffirmation of the open door policy was the most essential thing that we could have at this time; and we discussed the phrase which appeared in the draft note, "special interest," and I told him then that if it meant "paramount interest" I could not discuss it further; but if he meant special interest based upon geographical position, I would consider the insertion of it in the note. Then it was, during that same interview, that we mentioned "paramount interest" and he made a reference to the Monroe Doctrine and rather a suggestion that there should be a Monroe Doctrine for the Far East. And I told him that there seemed to be a misconception as to the underlying principle of the Monroe Doctrine; that it was not an assertion of primacy or paramount interest by the United States in its relation to other American Republics; that its

<sup>38</sup> *Senate Hearings*, p. 225.

<sup>39</sup> *Ibid.*, etc., pp. 223-224.

purpose was to prevent foreign Powers from interfering with the separate rights of any nation in this hemisphere, and that the whole aim was to preserve to each republic the power of self-development. I said further that so far as aiding in this development the United States claimed no special privileges over other countries. . . . I told Viscount Ishii that I felt that the same principle should be applied to China, and that no special privileges and certainly no paramount interest in that country should be claimed by any foreign Power. While the phrasing of the notes to be exchanged was further considered, the meaning of "special interest" was not again discussed.

When asked whether Viscount Ishii apparently agreed with his view as to the meaning of "special interests," Secretary Lansing replied that "he maintained silence."

It thus appears that Viscount Ishii suggested that the words "special interests" should be inserted, and that Secretary Lansing refused to proceed with the discussion if the words were to be understood to mean paramountcy. Ishii maintained a judicious silence and has ever since apparently insisted that his interpretation is the correct one.

While the negotiations were in progress, Bakhmeteff, the Russian Ambassador, evidently discussed the matter with Mr. Lansing. Among the documents published by the Russian revolutionists is a dispatch from M. Krupensky, Russian Ambassador at Tokio, to the Russian Foreign Office. It is dated October 22, 1917, and reads as follows:

Referring to Bakhmeteff's N. 598, if the United States thinks, as it appears to our Ambassador, that the recognition of Japan's special position in China is of no practical consequence, such a view will inevitably lead in the future to serious misunderstanding between us and Japan. The Japanese are manifesting more and more clearly a tendency to interpret the special position of Japan in China, *inter alia*, in the sense that other Powers must not undertake in China any political steps without previously exchanging views with Japan on the subject, a condition that would to some extent establish a Japanese control over the foreign affairs of China. On the other hand, the Japanese Government does not attach great importance to its recognition of the principle of the open door and the integrity of China, regarding it as merely a repetition of the assurances repeatedly given by it earlier to other Powers and implying no new restrictions for the Japanese policy in China. It is therefore quite possible that

at some future time there may arise in this connection misunderstandings between the United States and Japan. The Minister for Foreign Affairs again confirmed today in conversation with me that in the negotiations by Viscount Ishii *the question at issue is not some special concession to Japan in these or other parts of China, but Japan's special position in China as a whole.*

In another dispatch from Tokio, dated November 1, M. Krupensky informed his government that the Japanese Minister of Foreign Affairs had that day "confidentially but quite officially" communicated to him the text of the notes which were to be exchanged at Washington, that a similar communication had been made to the British Ambassador, and that the French and Italian Ambassadors would receive the text of the notes in a day or two "privately, for their information." Krupensky was also informed that publication of the notes would probably take place on November 7, and in the meantime "the Ministry asks the Powers to keep his communications secret." The American Minister was evidently the only diplomat in the vicinity who had no knowledge of what was being done. Continuing in the November 1 dispatch, Krupensky wrote:

To my question whether he did not fear that in the future misunderstandings might arise from the different interpretations by Japan and the United States of the meaning of the terms "special position" and "special interests" of Japan in China, Viscount Motono replied by saying. . . . "Nevertheless, I gain the impression from the words of the Minister that he is conscious of the possibility of misunderstandings also in the future, *but is of the opinion that in such a case Japan would have better means at her disposal for carrying into effect her interpretation than the United States.*"<sup>40</sup>

Secretary Lansing was thinking of the reaffirmation of the policy of the open door, but Viscount Ishii's mind was on the "special interests," for the recognition of which the Mission had made the journey to America. Evidently Ishii informed Tokio of Lansing's interpretation of the phrase and that his silence should not be construed as acquiescence therein. Bakhmeteff must have been informed that Japan intended to place her own construction on the words even though it might lead to misunderstandings with the United States.

<sup>40</sup> These dispatches were published by the revolutionary government of Russia.

Japan's conduct in connection with the Lansing-Ishii agreement was not such as to impress the world with the frankness and honesty of her diplomacy and inspire confidence in her strict observance of the spirit as well as the letter of her engagements.

## VI

The Shantung provisions of the treaty would receive no support in the United States if it were certain that Japan would hold the former German interests permanently. But it is contended that Japan has obligated herself to transfer to China what she obtains under the treaty within a reasonable time after she secures title through the treaty with Germany. As this promise is practically the only justification for ratification without amendment, it is important to examine somewhat carefully into the terms of the promise and the nature of the obligation which Japan has assumed.

In the Japanese ultimatum of August 15, 1914, Germany was required to "deliver on a date not later than August 15 to the Japanese authorities without condition or compensation, the entire leased territory of Kiaochow, *with a view to the eventual restoration of the same to China.*"

But after Kiaochow had been secured the claim was made that the failure of the Germans to comply with the demand, and the resulting military operations, released Japan from any obligation to China inferable from the language of the ultimatum. Japan had, it was said, acquired independent rights in Shantung by the expenditure of blood and treasure in its capture. Mr. Suzuki, the Vice-Minister of the Navy, then announced that, "While the European war continues, Tsingtau will be administered by Japan. At the conclusion of the war Japan *will open negotiations with China.*" This in order, evidently, to secure from the latter some form of compensation. Early in December, 1914, Baron Kato declared that Japan had made, "no promises whatever in regard to the ultimate disposition of what she had acquired in Shantung." In answering interpellations he gave to the Japanese Diet the same assurance.

Question 1: Whether Kiaochow will be returned to China?

Answer: The question regarding the future of Kiaochow was, at present, unanswerable.

Question 2: Whether the Imperial Government of Japan were pledged to China, or to any other Power, in the matter of the final disposition of Kiaochow?

Answer: Japan had never committed herself to any foreign Power on this point.

Question 3: Whether the clause in the ultimatum referring to the final restitution of Kiaochow to China, did not bind the action of Japan?

Answer: The purpose of the ultimatum to Germany was to take Kiaochow from Germany and so to restore peace in the Orient. *Restitution after a campaign was not thought of and was not referred to in the ultimatum.*<sup>40a</sup>

Japan thus repudiated the idea that by reason of the statement to Germany of her purpose, she assumed any obligations to China. That is to say, a promise made by A to B for the benefit of C creates no rights in C as against A.

The ultimatum of May 7, 1915, which closed the negotiations on the twenty-one demands, stated that,

The Imperial Government in taking Kiaochow, made immense sacrifices in blood and money. Therefore after taking the place there is not the least obligation on the Imperial Japanese Government's part to return the place to China.

The original demands as presented to China January 18, 1915, required China to consent to all matters upon which the Japanese Government might thereafter agree with Germany relating to the disposition of the latter's rights in Shantung, but made no reference to their ultimate transfer to China. On February 22, 1915, China suggested that the time had arrived when Japan should make good the promise contained in her ultimatum to Germany and restore Kiaochow. To this there seems to have been no immediate reply. In the meantime the world had learned of the drastic nature of the demands which were being made on China, and Japan evidently realized that it was advisable to make some modifications. On April 26 a revised version was presented which contained the statement that

<sup>40a</sup> Millard, *Democracy and the Eastern Question*, p. 82.



if the entire twenty-one demands were accepted by China without change Japan would restore Kiaochow to China *at an opportune time and subject to certain conditions*. In presenting the reply on May 1, the Chinese Minister of Foreign Affairs read an extended memorandum in which he reviewed China's attitude and summarized the concessions she had made during the negotiations. With reference to Shantung he said, "Now since the Japanese Government has presented a revised list of demands and declared at the same time that it will restore the leased territory of Kiaochow, the Chinese Government reconsiders the whole question and herewith submits a new reply to the friendly Japanese Government." This reply accepted substantially all but two of the twenty-one demands and asked, "that Japan agree to the retrocession of Shantung and provide indemnification for the losses caused to Chinese subjects by the military campaign in the Province; and that Japan recognize the right of China to participate in the negotiations which would take place between Japan and Germany with regard to Shantung."<sup>41</sup>

Japan was much irritated by this request and the Japanese papers had much to say of the "insult" to which Japan had been thereby subjected. While China was a neutral, Japan without even asking China's consent, landed her troops in the north of the Province of Shantung, far from any German territory, without even the poor plea of necessity which Germany offered as justification for her invasion of Belgium. The suggestion that China should be indemnified for injuries caused by the illegal use of her neutral territory as a base for the Japanese operations against Germany was regarded as preposterous if not actually impertinent.

Thereupon the offer to restore Shantung was withdrawn and on May 7, an ultimatum was presented to China in connection with which it was said:

The discussion of the entire corpus of the proposals was practically at an end at the 24th conference; that is, on the 17th of the last month. The Imperial Government, taking a broad view of the negotiations and in consideration of the points raised by the Chinese Government, modified the original proposals with considerable concessions and presented to the Chinese Government on the 26th of the

<sup>41</sup> Hornbeck, *Contemporary Politics in the Far East*, p. 324.

same month the revised proposals for agreement, and at the same time it was offered that, on the acceptance of the revised proposals, the Imperial Government would at a suitable opportunity, restore with fair and proper conditions, to the Chinese Government the Kiaochow Territory in the acquisition of which the Imperial Government had made a great sacrifice.

On the 1st of May the Chinese Government delivered the reply to the revised proposals of the Japanese Government, which was contrary to the expectations of the Imperial Government. The Chinese Government not only did not give a careful consideration to the revised proposals but even with regard to the offer of the Japanese Government to restore Kiaochow to the Chinese Government *the latter did not manifest the least appreciation of Japan's good will and difficulties*. From the commercial and military points of view Kiaochow is an important place, in the acquisition of which the Japanese Empire sacrificed much blood and money, *and after acquisition the Empire incurs no obligation to restore it to China*. But with the object of increasing the future friendly relations of the two countries she went to the extent of proposing its restoration, yet, to her great regret, the Chinese Government did not take into consideration the good intentions of Japan and manifest appreciation of her difficulties. Furthermore the Chinese Government not only ignored the friendly feelings of the Imperial Government offering the restoration of Kiaochow Bay, but also in replying to the revised proposals *they even demanded its unconditional restoration*; and again China demanded that Japan should bear the responsibility of paying indemnity for all the unavoidable losses and damages resulting from Japan's military operations at Kiaochow; and still further in connection with the territory of Kiaochow China advanced other demands and declared that she has the right of participation at the future Peace Conference to be held between Japan and Germany. Although China is fully aware that the unconditional restoration of Kiaochow and Japan's responsibility of indemnification for the unavoidable losses and damages can never be tolerated by Japan, yet she purposely advanced these demands. . . . Since Japan could not tolerate such demands the settlement of the other questions, however compromising it may be, would not be to her interest.<sup>42</sup>

The ultimatum contained no reference to Shantung, but in an accompanying note it was stated that, "If the Chinese Government accepts all the articles as demanded in the ultimatum the offer of the Japanese Government to restore Kiaochow to China, made on the 26th April, will still hold good."

<sup>42</sup> Millard, *Democracy and the Eastern Question*, Appendix, p. 402.

Japan accompanied the ultimatum with a movement of her naval and military forces and China, being entirely without means for effective resistance, surrendered and signed a treaty which contained the following provisions:

Article I. The Chinese Government agrees to give full assent to all matters upon which the Japanese Government may hereafter agree with the German Government relating to the disposition of all rights, interests and concessions which Germany, by virtue of treaties or otherwise, possesses in relation to the Province of Shantung.

Article II. The Chinese Government agrees that as regards the railway to be built by China herself from Chefoo or Lung-kow to connect with the Kiaochow-Tsinanfu Railway, if Germany abandons the privilege of financing the Chefoo-Weihsien line, China will approach Japanese capitalists to negotiate for a loan.

Article III. The Chinese Government agrees in the interest of trade and for the residence of foreigners, to open by China herself as soon as possible certain suitable places in the Province of Shantung as commercial ports.

At the time of signing this treaty Japan by an exchange of notes made the following declarations to China:

When after the termination of the present war, the leased territory of Kiaochow Bay is completely left to the free disposal of Japan, the Japanese Government will restore the said leased territory to China under the following conditions:—

1. The whole of Kiaochow Bay to be opened as a commercial port.
2. A concession under the exclusive jurisdiction of Japan to be established at a place designated by the Japanese Government.

Art. III. If the foreign Powers desire it, an international concession may be established.

Art. IV. As regards the disposal to be made of the buildings and property of Germany and the conditions and procedure relating thereto, the Japanese Government and the Chinese Government shall arrange the matter by mutual agreement before the restoration.

Thereupon China issued an official statement of what had occurred and her reasons for acceding to the Japanese demands.<sup>43</sup> Having thus by duress secured the formal consent of China to any future arrangements she might make with Germany with reference to Shantung,

<sup>43</sup> Printed in full in *Hearings of the Senate Committee on Foreign Relations*, pp. 600-606.

Japan proceeded to consolidate her possession by securing pledges from Great Britain and France to support her demands at the future Peace Conference. She thus went to the Conference with the cards all in her hands. Of course the 1915 treaties were public and soon after reaching Paris Baron Makino issued a statement in which he said,

Japan is now pledged to return to China this harbor and port, built with German money, together with the territory of Kiaochow which China will receive eighty years sooner than she could possibly have received it. The treaty of 1915 under which this restoration is to be made contains no secret clauses and an agreement entered into in 1918 regarding Chino-Japanese coöperation in Shantung contains no stipulation which is more or less than a just and mutually helpful settlement of outstanding questions.

The other Powers were not informed of the arrangement under which Great Britain and France were to support Japan's claims at the Conference. It does not appear when this information was conveyed to China, but evidently her representatives first learned of it through reports at Paris. President Wilson's statement to the Senate Committee with respect to the secret treaties and as to what occurred at the Conference in connection with the Japanese demands is so important that it must be quoted in full:

Senator Borah: . . . I should like to know when the first knowledge came to this Government with reference to the secret treaties between Japan, Great Britain, Italy and France concerning the German possessions in Shantung.

The President: I thought that Secretary Lansing had looked that up and told you. I can only reply from my own knowledge, and my own knowledge came after I reached Paris.

Senator Borah: We did get a reply from Mr. Lansing to the same effect so far as he was concerned. When did the secret treaties between Great Britain, France and the other nations of Europe with reference to certain adjustments in Europe first come to your knowledge? Was that after you had reached Paris?

The President: Yes, the whole series of understanding were disclosed to me for the first time then. . . .

Senator Borah: Do you know when the secret treaties between Japan, Great Britain, and other countries were first made known to China?

The President: No, sir, I do not. I remember a meeting of what was popularly called the Council of Ten, after our reaching Paris, in which it was first suggested that all these understandings should be laid upon the table of the Conference. That was some time after we reached there, and I do not know whether that was China's first knowledge of these matters or not.

Senator Borah: Would it be proper for me to ask if Great Britain and France insisted upon maintaining these secret treaties at the Peace Conference as they were made?

The President: I think it is proper for me to answer that question, sir. I will put it in this way. They felt that they could not recede from them, that is to say that they were bound by them, but when they involved general interests such as they realized were involved, they were quite willing and indeed, I think, desirous that they should be reconsidered with the consent of the other parties. I mean with the consent, so far as they were concerned, of the other parties.<sup>44</sup>

It thus appears that upon principle Japan stood alone at the Conference. Her sensibilities and her interests in China, political and economic, were allowed to prevail against the demands and rights of China supported by the United States and backed by the moral judgment of the world. Japan was securing her position in China at the expense of China, an ally, and not of Germany, and why her demands should have been conceded is difficult to comprehend on any theory other than that she had the Council of Four completely bluffed by her threats expressed or implied to withdraw from the Conference, refuse to sign the treaty and make a possible combination with Germany and Russia for the domination of the Far East.

Japan's attitude with reference to the return of Shantung to China as disclosed in her negotiations with China has already been stated. But before the meeting of the Peace Conference she had made no agreement with respect to the return of Shantung to China with other Powers and, except as fixed by the 1915 and 1918 treaties, remained free to negotiate with China over the terms of the restoration. At Paris, however, she gave certain informal assurances in

<sup>44</sup> *Senate Hearings*, pp. 520, 521. Prof. E. T. Williams, one of the American experts, gave the Senate Committee a statement in detail of what occurred in connection with the presentation of the Japanese demands. *Senate Hearings*, pp. 617-621.

secret to the representatives of the United States, Great Britain and France.

In answer to a question whether the understanding was oral or otherwise the President said, "I do not like to describe the operation exactly if it is not perfectly discreet, but as a matter of fact this was technically oral but literally written and formulated and the formulation agreed upon." The evidence of the promise however is merely the recollection of the gentlemen who heard it made behind the closed doors of the Conference room of the Council of Four and certain contemporaneous memoranda which the President thus describes:

The President: They are evidenced in a *procès verbal* of the so-called Council of Four . . . the four who used to confer, or rather the five, because Japan was there, of course, at that time.

Senator McCumber: The principal points were taken down in writing and read over and compared and preserved, were they?

The President: Not read over and compared, but preserved. The process each day was this, Senator,—the matters discussed were summarized, and the conclusions reached were recorded in a *procès verbal*, copies of which were distributed within twenty-four hours; and of course it was open to any one of the conferees to correct anything they might contain. Only in that sense were they corrected.

Senator McCumber: Where are those records kept now?

The President: They are in Paris.

Senator McCumber: Is there any objection to their being produced for the Committee?

The President: I think there is a very serious objection, Senator. The reason we constituted that very small conference was so that we could speak with the utmost absence of restraint and I think it would be a mistake to make use of those discussions outside.

It might reasonably be said, however, that a definite promise upon which the nations are asked to rely in a matter of such importance is scarcely within the scope of the term "discussions" as here used.

Senator Moses: Mr. President, are these *procès verbaux* to be deposited anywhere as a matter of public record?

The President: That has not been decided. Of course, if they were deposited as a matter of public record, there would be certain very great disadvantages.

Senator Moses: Are they to be deposited with the Secretariat of the League of Nations?

The President: No, sir.

Senator Moses: Without some such depository how otherwise would this engagement of Japan, as embodied in the *procès verbal*, be brought forward for enforcement?

The President: There would be as many copies of the *procès verbal* as there were members of the conference in existence, much longer than the time within which we shall learn whether Japan will fulfil her obligations or not.

Senator Moses: You mean in the private papers of the personnel of the Council of Four.

The President: I would not call them private papers. I have a copy, Senator. I regard them as a public trust, not private papers, and I can assure you they will not be destroyed.

Senator Moses: Suppose that each member of the Council of Four had passed out of office, out of any position of power at a time when it became evident that Japan was not keeping the engagement as it was embodied in the *procès verbal* on the day when this record was made, in what manner would you expect that engagement to be brought forward for enforcement?

The President: I should deem it my duty,—I cannot speak for the others, to leave those papers where they could be made accessible.

Senator Swanson: Can you tell us, or would it be proper to do so, of your understanding with Japan as to the return of Shantung? That is a question which has been very much discussed.

The President: I have published the wording of the understanding, Senator. I cannot be confident that I quote it literally, but I know that I quote it in substance. It was that Japan should return to China in full sovereignty the old Province of Shantung so far as Germany had any claims upon it, preserving to herself the right to establish a residential district at Tsingtau, which is the town of Kiaochow Bay; that with regard to the railways and mines she should retain only the rights of an economic concession there, with the right, however, to maintain a special body of police on the railway, the personnel of which should be Chinese under Japanese instructors nominated by the managers of the company and appointed by the Chinese Government. I think that is the whole of it . . . she has promised not to retain sovereignty at all. (§ 521.)

The time when this promise shall be performed was left undetermined except as it is inferable that it shall be done within a reasonable time. This is made very clear by the President's statement:

Senator Johnson: When, Mr. President, is the return to be made?

The President: That was left undecided, Senator, but we were assured at the time that it would be as soon as possible.

Senator Johnson: Did not the Japanese decline to fix any date?

The President: They did at that time, yes, but I think it is fair to say not in the spirit of those who wish it to be within their choice, but simply that they could not at that time say when it could be done.

Senator McCumber: In those conversations it was fully understood that Japan was to return Shantung as soon as possible?

The President: Yes, sir.

Senator McCumber: Was there anything stated as to what was meant by "as soon as possible," that is, to place it within any definite period at all?

The President: No, sir, no. We relied on Japan's good faith in fulfilling that promise.

Senator McCumber: Was there anything said by Japan as to anything that she would want to do before she turned the territory over to China?

The President: No, nothing was mentioned.<sup>45</sup>

The assurance given by the head of the Japanese delegation during the negotiations, not incorporated in the treaty or expressed in a formal note, is a very unsatisfactory foundation for a binding national obligation. The authority to make such an informal promise in the possible event of a change of administration in Japan, may be questioned by their political opponents. If Japan intended to enter into a binding agreement with the Allied and Associated Powers which would restrict the future freedom of action of the Japanese Government in respect to Shantung, there was no apparent reason why it should not have been done in the usual manner. The idea, so persistently advanced, that a request or demand that the promise be embodied in the treaty and thus tied in with the general settlement would have amounted to questioning the good faith of Japan is neither more nor less than sheer nonsense. The United States did not consider that she had been "insulted" when France insisted that the promise to come to her assistance under certain contingencies

<sup>45</sup> Statements of President Wilson to Senate Committee, August 19, 1919, *Hearings, etc.*, Pt. 10, pp. 520-524.



should be made in the form of a duly executed; ratified and proclaimed treaty.

The general criticism of the Shantung sections of the treaty impressed Japanese officials with the advisability of making further statements of intention. On August 2, 1919, Viscount Uchida, Minister of Foreign Affairs, gave the following statement to the press:

It appears that, in spite of the official statement which the Japanese Delegation at Paris issued on May 5th last, and which I fully stated in an interview with the representatives of the press on May 17th, Japan's policy respecting the Shantung question is little understood or appreciated abroad.

It will be remembered that in the ultimatum which the Japanese Government addressed to the German Government on August 15, 1914, they demanded of Germany to deliver, on a date not later than September 15, 1914, to the Imperial authorities, without condition of compensation, the entire leased territory of Kiao-Chau with a view to eventual restoration of the same to China. The terms of that demand have never elicited any protest on the part of China or any other Allied or Associated Powers.

Following the same line of policy, Japan now claims as one of the essential conditions of peace that the leased territory of Kiao-Chau should be surrendered to her without condition or compensation. At the same time abiding faithfully by the pledge which she gave to China in 1915, she is quite willing to restore to China the whole territory in question and to enter upon negotiations with the Government at Peking as to the arrangement necessary to give effect to that pledge as soon as possible after the Treaty of Versailles shall have been ratified by Japan.

Nor has she any intention to retain or to claim any rights which affect the territorial sovereignty of China in the Province of Shantung. The significance of the clause appearing in Baron Makino's statement of May 5th, that the policy of Japan is to hand back the Shantung peninsula in full sovereignty to China, retaining only the economic privileges granted to Germany, must be clear to all.

Upon arrangement being arrived at between Japan and China for the restitution of Kiao-Chau, the Japanese troops at present guarding that territory and the Kiao-Chau-Tsinanfu Railway will be completely withdrawn.

The Kiao-Chau-Tsinanfu Railway is intended to be operated as a joint Sino-Japanese enterprise without any discrimination in treatment against the people of any nation.

The Japanese Government have, moreover, under contemplation proposals for the reëstablishment in Tsingtao of a general foreign settlement, instead of the exclusive Japanese settlement which by the agreement of 1915 with China they are entitled to claim.

President Wilson evidently thought that Viscount Uchida's statement contained the germs of future disagreements and in the interest of clarification he gave out the following:

The statement of Viscount Uchida ought to serve to remove many misunderstandings which had begun to accumulate about this question. But there are references in the statement to an agreement entered into between Japan and China in 1915 which might be misleading if not commented upon in the light of what occurred in Paris when the clauses of the treaty affecting Shantung were under discussion. I therefore take the liberty of supplementing Viscount Uchida's statement with the following:

In the conference of the 30th of April last, where this matter was brought to a conclusion among the heads of the principal Allied and Associated Powers, the Japanese delegates, Baron Makino and Viscount Chinda, in reply to a question put by myself, declared that:

The policy of Japan is to hand back the Shantung Peninsula in full sovereignty to China, retaining only the economic privileges granted to Germany, and the right to establish a settlement under the usual conditions at Tsingtao.

The owners of the railway will use special police only to insure security for traffic. They will be used for no other purpose.

The police forces will be composed of Chinese, and such Japanese instructors as the directors of the railway may select will be appointed by the Chinese Government.

No reference was made to this policy being in any way dependent upon the execution of the agreement of 1915 to which Count Uchida appears to have referred. Indeed, I felt it my duty to say that nothing that I agreed to must be construed as an acquiescence on the part of the Government of the United States in the policy of the notes exchanged between China and Japan in 1915 and 1918; and reference was made in the discussion to the enforcement of the agreements of 1915 and 1918 only in case China failed to cooperate fully in carrying out the policy outlined in the statement of Baron Makino and Viscount Chinda.

I have, of course, no doubt that Viscount Uchida had been apprised of all the particulars of the discussion in Paris, and I am not making this statement with the idea of correcting his, but only to throw a fuller light of clarification upon a situation which ought to be relieved of every shadow of obscurity or misapprehension.<sup>46</sup>

<sup>46</sup> The statement of Viscount Uchida of August 2nd and that of President Wilson of August 6th appeared in the *New York Times* of August 7, 1919.

Thereupon Premier Hara, through the Associated Press, said:

My colleague, Viscount Uchida, Minister of Foreign Affairs, issued a statement on August 2d in explanation of our policy respecting the Shantung question. That statement represents the considered opinion of this government, and I have little to add in dealing with the same subject.

The question is often asked as to when Japan will return Kiaochow to China. I would point out in reply that for the restitution of Kiaochow detailed arrangements should be worked out beforehand in common accord between the Japanese and Chinese Governments and that the length of time required for such arrangements depends largely upon the attitude of China. In any case, we fully realize that it is as much in our own interest as in the interests of China to accelerate the conclusion of all needed arrangements and to effect without unnecessary delay the restitution of leased territory which we have solemnly undertaken.

On September 3, 1919, Mr. Matsuoka, a member of the Japanese delegation at Paris, informed the press that he would not be surprised if his government opened within a very few months or even a few weeks, negotiations with the Chinese Government with a view to settling the Shantung question. "To those of us who have participated in the Peace Conference, there is not the shadow of doubt that Japan will withdraw from Shantung at the earliest possible moment." According to Mr. Matsuoka, the main points of the terms on which Japan will return Shantung are:

First—Japan is to restore Kiaochow, the German leased territory, to China.

Second—In returning Kiaochow to China, Japan, in the interest of all nations, asks only one thing, namely, that the territory be open to international trade. It is only as a natural corollary of this proposed measure that Japan also desires to establish an international, not a Japanese, settlement in the city of Tsingtao. In the Chino-Japanese agreement of May 25, 1915, a Japanese settlement was to have been established in addition to an international one, but Viscount Uchida, our Foreign Minister, declared on August 6th last, that Japan would waive the right to establish a Japanese settlement.

Third—Japan will withdraw all her troops, not only from the railway zone, but from Tsingtao. After the restitution of Kiaochow not a single Japanese soldier will be left on the soil of Shantung.

Fourth—The Shantung Railway of 270 miles will be operated, not by Japan, but by a Chino-Japanese joint corporation, in which

both Japanese and Chinese capital will be represented. Of course, China will participate in the management of this railway.

Fifth—Japan will withdraw her police forces from along the railway and intrust the Chinese authorities with the policing of that region.

Besides the matters included in the above five categories there are questions of the German submarine cables, railway loans and preferential rights with regard to the supply of capital and materials and the employment of foreigners in Shantung. I believe these questions can easily be settled.<sup>47</sup>

It cannot be known how authoritative this statement is, but if the Japanese would enter into a formal engagement along these lines, all substantial objections to the ratification of the treaty would be removed. However, Viscount Uchida did not, as Mr. Matsuoka states, say that Japan would waive the right to establish a foreign settlement. He merely said that the Japanese Government "had under contemplation proposals for the reestablishment at Tsingtao of a general foreign settlement, instead of the exclusive Japanese settlement which by the agreement of 1915 with China they are entitled to claim." According to the press reports, the suggestion has raised a storm of objection in the Japanese militarist press.

President Wilson and his supporters assume that Japan will

<sup>47</sup> In reply to Mr. Matsuoka, the Chinese technical delegate, Mr. Cai-Chi Quo, issued a statement which shows very well the Chinese attitude toward Japan. Said Mr. Quo: "Frankly, China would prefer to have Germany in Shantung instead of Japan, if that were the only alternative, because Shantung is far removed from Germany, while in the hands of the Japanese there is added danger to China on account of Japan's already strongly fortified possessions in Corea and South Manchuria.—*New York Times*, Sept. 3, 1919. Mr. Matsuoka also states that the Shantung railway will be under Sino-Japanese management. But that is no gain for China, because the Shantung railway was under the joint Chinese-German management and many Chinese were employed in the railway service, whereas now they have been almost entirely replaced by Japanese. If an international settlement is to be for the interests of all nations, as Mr. Matsuoka claims, it is well to bear in mind that only recently the American Standard Oil Company was compelled to sell out its premises in Tsingtao. We may also call attention to how Japan is operating in Manchuria against the open door policy and how in recent years in Manchuria American and European business firms had to close up their business. Just now she is trying to exclude that region and Mongolia from the new international consortium.—*New York Herald*, Sept. 6, 1919.

adhere to her demands regardless of the attitude of other nations and that Great Britain and France will continue to support her regardless of consequences. According to Senator Hitchcock, "It is preposterous to suppose that Japan will . . . yield up the provisions relating to Shantung."

If the Matsuoka statement is inspired and represents the present view of the Japanese Government, it suggests that Japanese statesmen, like those of other countries, are open to reason.

## VII

In August, 1914, Count Okuma announced to the world that "Japan has no ulterior motive, no desire to secure more territory, no thought of depriving China or other peoples of anything which they now possess."

At the present time Japanese statesmen and the Japanese press are energetically asserting that the almost universal protest against her Chinese policy rests upon a misunderstanding of her motives and intentions, but the world will judge Japan by her conduct and not by the high-sounding asseverations of more or less responsible statesmen and publicists.

The simple fact is that it is impossible to square Japanese dealings with Shantung with this statement of Count Okuma.

The preamble to the Covenant of the League of Nations recites that one of the objects of the League is to secure the scrupulous respect for all treaty obligations by all peoples. The ratification of the treaty of peace by China and Japan will therefore unquestionably remove any doubts which may now exist as to the binding force of the treaties of 1915 and 1918. If China persists in her refusal to sign the treaty Japan will nevertheless secure the formal recognition of these treaties by the Powers. Japan's promise to the Council of Four, and the statements recently made by Viscount Uchida and other statesmen, must necessarily be construed in connection with these treaties, which constitute inseparable component parts of the obligation she has assumed.

An analysis of the articles of the treaty of peace and the terms

of the promise discloses very clearly that even if the promise is fulfilled, China will be in much worse condition than had the transfer been made to her by Germany. Japan will acquire new territory and greatly strengthen her political and economic position in China.

Under Article 156 Germany renounces in favor of Japan "all her rights, titles and privileges—particularly those concerning the territory of Kiaochow, railways, mines and submarine cables" which she acquired under the treaty of March 6, 1898, and "all other arrangements relative to Shantung." All are renounced in favor of Japan. A renunciation is not the equivalent of a conveyance and the title remains in Germany. However, under this article, if the treaty is ratified Japan will obtain whatever rights, privileges and property the German Empire had in Shantung. The second paragraph of Art. 156 states that "all German rights in the Tsingtao-Tsinanfu Railway including . . . mines, plant, and material for the exploitation of its mines, *are and remain acquired by Japan.*" The next paragraph, after describing the submarine cables, declares that they "*are similarly acquired by Japan.*" A distinction is thus made between the leased territory of Kiaochow, which is merely renounced in favor of Japan, and the German railways, mines and submarine cables which it is declared "*shall remain acquired by Japan.*"

In the same manner by Art. 157 there "*are and remain acquired by Japan,*" (1) the moveable and immovable property owned by the German State in the territory of Kiaochow, and also (2) all the rights which Germany *might claim* in consequence of the works or improvements made, or of the expenses incurred by her directly or indirectly, in connection with this territory. Under this language what Germany *might claim* Japan *may claim*. The possibilities suggested by such phrases as "may claim" and "other arrangements relative to the Province of Shantung" are very impressive.

According to the notes which were exchanged at the time of the signing of the treaty of 1915, Japan agrees "to restore *the said leased territory* to China on the following conditions—(1) the whole of Kiaochow Bay to be open as a commercial port, (2) a concession *under the exclusive jurisdiction of Japan* to be established at a place

designated by the Japanese Government, (3) if the foreign Powers desire it, an international concession may be established."

It will be noted that the agreement is to return only the German leased territory of Kiaochow Bay. No reference is made to the railways, mines, or submarine cables which under the Treaty of Peace are to remain acquired by Japan. However, a fourth section states that "as regards the disposal to be made of the buildings and properties of Germany, and the conditions and procedure relating thereto, the Japanese and Chinese Governments will arrange the matter by mutual agreement before the restoration." This does not refer to the railroads, mines or submarine cables, or the subsidiary property mentioned in connection therewith in Article 156. As here used, "buildings" refers, of course, to the structures belonging to the government and used for public purposes, such as residences and offices of officials. "Properties" under the ordinary rules of construction in connection with the word buildings, doubtless refers to structures not classifiable as buildings, such, for instance, as water-works, and certain other public utilities. Under the treaty of 1915, Japan agrees merely to return the leased territory with the reservations named, and before doing so to arrange for the disposal of the public buildings and property. Until China conformed to Japan's idea of the "arrangement" Japan would not be obliged to make the restoration.

Baron Makino's statement issued at Paris May 6, 1919, was that Japan was pledged to restore the territory of Kiaochow and the harbor and port, retaining the economic privileges granted to Germany. According to Viscount Uchida's statement of August 6, Japan is "quite willing to restore to China the whole territory in question and to operate the Kiaochow-Tsinanfu Railway as a joint Sino-Japanese enterprise." It appears that in 1918 some such arrangement for the operation of the railway was made through the Chinese Ambassador at Tokio. In his recent statement Viscount Uchida carefully tied his Government's promise of restoration in with the 1915 treaty, and President Wilson immediately declared that the promise made to the Council of Four at Paris was not conditioned on the execution of the 1915 and 1918 agreements.

According to the President the promise was "to hand back the Shantung peninsula in full sovereignty to China, retaining only the economic privileges granted to Germany and the right to establish a settlement under the usual conditions at Tsingtao." With regard "to railways and mines she should retain only the rights of an economic concession there with the right, however, to maintain a special body of police on the line."

But just what are the "rights of an economic concession" in connection with these railroads and mines? It is reasonably certain that the 1915 and 1918 treaties, the promise made to the Council of Four, and the statements recently given out by Japanese statesmen are capable of different constructions, and contain the germs of extended diplomatic discussion between Japan and China.

After the leased territory has been returned Japan may reasonably claim the right to retain the railway, the mines, and the properties subsidiary thereto and all rights and privileges connected therewith; all the German state-owned property, the economic privileges possessed by Germany, the extent of which is left in doubt, and the concession under her exclusive jurisdiction of territory to be selected by her,—very substantial acquisitions.

The Tsingtao-Tsinanfu Railway, which by the treaty "is and remains acquired by Japan," was supposed to be a private Sino-Japanese corporation, but certain Japanese now claim that it was German state owned, and in all probability this is true. If so, it passed to Japan absolutely with the obligation, of course, to protect the limited Chinese interest therein. Even if the railway was in a technical sense privately owned property, it is transferred by the treaty to Japan, leaving her to adjust any private interests therein possessed by German and Chinese capitalists.

The territorial concession is of exclusive jurisdiction over the selected area in perpetuity; something very different from the German lease for 99 years with the right of administration, the title and sovereignty being reserved by China. It has been stated recently that Japan is willing to abandon this concession and consent to an international concession in lieu thereof. If this is true the agitation in the Senate and elsewhere has accomplished something for China



and the world. But Japan has not so far proceeded on that theory. Without waiting to acquire title to the concession under the Treaty of Peace, she proceeded to select the site for the exclusive settlement at Tsingtau. The 1915 treaty provides that the size of the concession, as well as its location, shall be determined by Japan and it is clear that she has staked out the territory which is the key to the situation. The return of the leased territory of Kiaochow, after reserving this carefully selected part thereof, will be like handing back the shell after retaining the kernel.

The Kiaochow territory is not in itself very important; its value is in connection with the port of Tsingtao. After the Japanese have made their selection what remains goes into an international concession. As Dr. Ferguson told the Senate Committee, "it has never been officially stated by Japan as to what place she is going to occupy, but judging from her purchases of property and from the natural place which she would take, it is to be the port of Tsingtao, which is the part that Germany developed, and I might say, the only part of Kiaochow which is of any value. The entrance to the northern part of the Kiaochow territory consists in part of precipitous cliffs, which are quite unapproachable. The southern part of Kiaochow Bay is all silted up with sand-bars and is unapproachable even by small Chinese junks. The only part of Kiaochow territory which is of any value commercially to China or to any other nation is that portion which Japan proposes to retain for her own exclusive jurisdiction." The concession includes about one-half of the total population in Kiaochow and about one-tenth of the territory. Over this concession Japan is to have exclusive jurisdiction, which means that she will exercise "all rights, commercial, economic, governmental, military; in that area is the terminus of the railroad . . . it would become *ipso facto* a part of Japan and be under the same *status* so far as treaty rights are concerned as to foreigners as any other part of Japan."<sup>48</sup>

<sup>48</sup> *Senate Hearings*, pp. 559-535. The territory selected "includes all the wharves and other port facilities, all of the railway terminals, the cable terminals, the central telegraph, telephone and post offices, the customs together with all the best business and governmental sites in Tsingtao." Dr. J. W. Jenks, *N. A. Rev.*, Sept., 1919, p. 321.

The control of Tsingtao, and the railways and mines in Shantung, gives practically economic control. Kiaochow Bay is the best port on the coast north of the Yangtze River. The railway now completed to Tsinanfu (256 miles) connects with the main line to Peking and when extended will connect with the railroad from Hankow to Peking. By another extension already agreed to, it will connect with the grand trunk line to be built under a concession granted to Belgians, which will extend from the west far up into northwest China toward Turkestan. Kiaochow Bay can thus be made by the Japanese an outlet for all the trade of North China. The railways which feed the port also tap the coal fields, not only of Shantung but also of Shansi, the largest in the world. In fact the possession and control of the harbor of Kiaochow carries with it economic control of all North China. It is as though Great Britain held New York and the railway systems extending west and northwest therefrom.

The Senate must act upon the existing conditions. The treaty has been signed by the President. China has declined to sign it and it is said that she has declared a condition of peace with Germany. Japan has signed the treaty, but has not ratified it.

The Senate may simply refuse to approve the Shantung provisions, thus preserving its own virtue immaculate and ignoring the consequences to China, or it may amend the treaty by substituting "China" for "Japan" where it appears in the Shantung sections. The treaty must then go back for consideration by the signatory Powers. If Japan acquiesces in the change, the result will be satisfactory to the United States, Great Britain and France and to China. If Japan refuses to sign the treaty as amended, she will be isolated internationally, a situation not to be lightly assumed. She will, however, be in possession of Shantung. China has not the military power necessary to evict her and will probably resort to the boycott. Bitterness, confusion and war will doubtless result. China will not be supported materially by any of the nations and will be reduced to the condition of practical vassalage. However, there is no reason to assume that Great Britain and France will continue their support of Japan if the treaty is amended and sent back for reconsideration. All they agreed to do was to support her demands at the Conference.

Their promises were kept and performed. It is very improbable that Great Britain and France will support Japan when it becomes clear that the result will be disorganization of world arrangements and war in the Far East. Japan may find it necessary to withdraw her demands, as other nations have been obliged to do occasionally. In fact it may be a good time to have militant Japan taught the lesson that she cannot always have her own way.

Or the treaty may be ratified as it was signed, in reliance on the promises which have been made by Japan with the intention of seeing that the promises are kept. The objections to this course are based on want of confidence in Japan's good faith and the fear that she will quibble over the terms and conditions and thus delay performance indefinitely. The fact is that military Japan is a replica of old military Germany. Its theories of government are the same. A divinely inspired Emperor is held to be the source of all political power. Its theories of government are the very opposite of democracy. It is this saber-rattling Japan which is so easily irritated. Its foreign policy is based on military power and a willingness to resort to force to sustain its demands. There is no blinking the fact that its sinuous diplomatic methods have brought Japan into such disrepute that the world demands guarantees for the performance of her promises. But there is another Japan, a modern Japan, in which the germs of a democratic system are developing. For the first time in her history, Japan has an anti-militaristic administration. May it be assumed that this administration will continue in power and keep its international promises in spirit as well as in letter?

The purpose of this article is to state the Shantung question, not to solve it.

CHARLES BURKE ELLIOTT.

## EDITORIAL COMMENT

### THE "UNDERSTANDINGS" OF INTERNATIONAL LAW

The Preamble of the Covenant of the League of Nations contains an implied commentary on the law of nations that warrants consideration. It reads as follows:

The high contracting parties, in order to promote international coöperation and to achieve international peace and security by the acceptance of obligations not to resort to war, by the prescription of open, just and honorable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another, agree to this Covenant of the League of Nations.

Stated in other terms, international peace and welfare are to be obtained: (1) by agreements not to fight; (2) by higher standards of diplomacy; (3) by agreements as to the meaning of international law; and (4) by a more honorable regard for the sanctity of treaty obligations. The place of international law in this "constitution" for the world is subsidiary to other considerations. It is not to be regarded as the bedrock of peace and justice.

Furthermore, the language employed, namely: "by the firm establishment of the understandings of international law as the actual rule of conduct among nations" especially challenges attention. The law of nations is to be regarded first, as not having been clearly *understood*; second, as requiring to be established; and third, as being a "rule of conduct among governments".

By implication the great system of law that has been laboriously built up by judicial action and by firmly established custom and positive consent is seriously slighted in this Preamble of the Covenant of Nations. Instead of a robust and ringing assertion of the sanctity and vigor of long-established international law, we have a feeble reference to its *understandings*!

It has been difficult to find a definition of international law that

will command general acceptance. As long as divergence of views exists regarding its very nature, regarding the distinct class of interests to which it applies, and especially the character of its sanctions, any definition is subject to criticism. For example, the criticism of the Austinian school of jurists, which would relegate international law to the field of morality, makes its definition difficult.

Thus, if the idea suggested by the Preamble of the law of nations as a rule of conduct is to be interpreted in the *moral* sense, its place becomes entirely subsidiary in the great scheme for a "Covenant of the League of Nations". If, however, as is to be hoped, the intention was to imply a *legal* rule of conduct obligatory on courts and individuals as well as on "governments", the implied definition may be accepted without objection as in accord with the views of most international law publicists.

But the term "understandings of international law" is utterly objectionable and reprehensible. It affronts especially our Anglo-Saxon conceptions of a solid system of law that has grown up by custom and consent; has been judicially recognized and interpreted; and has been crystallized, not into *understandings*, but into definite principles which may be invoked successfully in any court of justice. The law of nations may have its decided limitations and defects like other bodies of law, but it is grievously and needlessly affronted when these principles are characterized as "understandings" that require firmer establishment. This certainly is not the conception of international law repeatedly approved and asserted by decisions of the United States Supreme Court, notably in the more recent case of *The Paquete Habana* (175 U. S. 677).

One is curious to know what lay behind the thought of the draftsman who penned the phrase "understandings of international law". Did he have any conception of a definite system of law—imperfect to be sure—but in the process of orderly development? Or did he conceive of international law merely as a "gentleman's agreement" on a par with "regional understandings" referred to in another part of the Covenant, and other diplomatic, political understandings? The problem is most intriguing.

It is possible that the Hague Conventions governing the conduct of war may have had something to do with this current impression of international law as a series of understandings. The failure of some of the belligerents to observe all the provisions of these conventions,

particularly the cynical contempt shown by Germany toward such understandings, led many unthinking persons to think of international law as a broken reed.

The attempt to identify the law of war with international law proper has been largely responsible, of course, for this popular scorn. The writers on this subject have not always been clear to distinguish between the true function of international law to regulate the peaceful relations of nations, and the function of war, which is the suspension—the very negation of law.

Furthermore, conventions governing the conduct of war are truly to be regarded as understandings, inasmuch as they depend entirely on the arbitrary will of commanders on the battle-field. Unlike ordinary rules of international law which may be invoked in any court of justice, the laws of war cannot be considered by any court except one imposed by the victorious belligerent. They are substantially nothing but gentlemen's agreements or understandings depending on good sense and good faith.

If Germany had won this war, one might well have despaired concerning the future of international law. The German conception of the law governing the peaceful relations of states was controlled by a blind, selfish expediency, by a Prussian interpretation of the understandings of the law of nations. It was to prevent such a catastrophe, to safeguard the sanctity of law and lift it high above the level of mere understandings that bound the great majority of nations together against an outlaw. They refused to permit any discussion concerning the fundamental rights of nations. These were to be regarded as *law* and admitting of no misunderstandings!

The Anglo-Saxon idea of jurisprudence abhors this suggestion of basing law on discussion and understanding. It conceives of law as a natural growth and evolution from custom to code, with an admixture of statute law. It spurns judge-made law, except in the sense that the court merely recognizes rules of law already accepted in one form or another by the community. It believes in a great body of basic principles properly coördinated and cemented together into one rational system. Pure international law may be imperfect and not efficiently enforced, but it is entitled to infinite respect, and is not to be regarded as controversial in character, subject to discussion and liable to a variety of interpretations and understandings.

It is possible that the Preamble of the Covenant of the League of

Nations in employing the term "understandings of international law" contemplated its recognition by some legislative action on the part of the members of the League. It is greatly to be regretted, however, that it was not explicit in its meaning and did not clearly assert the sanctity and the vigor of that great body of international law already in existence as the true foundation of the Covenant of the League of Nations.

PHILIP MARSHALL BROWN.

THE PROVISIONS OF THE TREATY OF PEACE DISPOSING OF GERMAN RIGHTS  
AND INTERESTS OUTSIDE EUROPE

To understand the various parts of a treaty, one must bear in mind the theory which guided in the negotiation of the whole.

This theory cannot be found expressed in the text of the Treaty of Versailles. It must be gathered rather from the preliminaries and the context and inferred from the provisions.

I assume, without argument, that the basic theory of the treaty is self-defense. Reparation for the past and protection for the future; these two principles are combined to weaken the German military power and to render it innocuous.

The process is harsh, undoubtedly, the result crushing, and some latitude is given for better treatment upon good behavior and loyal acceptance of the conditions within the League of Nations. Moreover, the power for reparation may well have been limited because of conditions deemed essential for protection. This is killing the goose which lays the golden eggs.

With these principles in mind, let us briefly examine that portion of the treaty which disposes of German rights and interests outside of Europe, with the exception of Shantung, which is discussed by another writer.<sup>1</sup>

Under this heading are included: first, German colonies, and second those states where Germany had secured special rights or privileges, China, Siam, Liberia and Morocco, to which Egypt should be added.

Part IV, Section I, Article 119, reads thus: "Germany renounces

<sup>1</sup> See *supra*, p. 687.

in favor of the Principal Allied and Associated Powers all her rights and titles over her oversea possessions."

Why should Germany be shorn of all her colonies? The answer is twofold: because she proved herself both cruel, selfish, and inefficient as an administrator; and because the future safety of those who were dictating the terms was thought to demand that Germany should be deprived of the power to build up colonial stations for naval war upon commerce, and colonial recruiting stations for the training of hordes of black forces available in future aggressive plans.

But who should possess these colonies if Germany did not? To discover this one must turn to the 22d Article of the Covenant of the League of Nations, which sets up the curious and novel Mandatory system. The first paragraph recites that

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the states which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position, can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical position of the territory, its economic conditions, and other similar circumstances.

The article goes on to distinguish between those peoples which are sufficiently advanced to require merely advice and protection until they can stand alone, and those which must remain quite dependent upon the Mandatory Power, being guarded by it from abuses like the slave trade and from traffic in arms and liquor, the military training of the natives for other than police purposes being barred, and commercial opportunities being common to all League members. Still other peoples are mentioned, like those of the South Pacific Islands, which can best be administered as integral parts of the Mandatory and under its laws. The kind of administration is to be defined by the Council of the League and an annual report made to it.

This is not the place to inquire if this Mandatory system will not



result in a protectorate and if a protectorate in turn will not be converted into possession. But we may venture to ask how a dispute is to be settled if two Powers desire to be Mandatory of the same people, if, for instance, the same Pacific Islands are wanted by both Japan and the United States?

To resume, German renunciation is to be complete in favor of that state which is charged with administrative authority over the Germanic colonies; all state and crown property passes; the former German inhabitants may be repatriated or allowed to reside, hold property and work, under conditions; no share of the German debt attaches, nor shall the products of the colonies be discriminated against.

Public works contracts held by German nationals in its ceded colonies must be transferred to the Mandatory upon demand, the individuals thus ousted to be indemnified by Germany, but this may be credited on her reparation debt.

Damages suffered by French subjects in the Camaroons between 1900 and 1914 are to be compensated, and all treaty rights relating to Equatorial Africa are renounced. And, finally, the Mandatory is entitled to give its native inhabitants diplomatic protection.

The settlement is minute, complete, drastic. Whether it is also workable, time alone can tell. No reference is made to native self-determination, their right to choose a protector, which Mr. Lloyd George advocated in one of his addresses. The Council, which is the mainspring of the League, is given large and arbitrary powers and much must depend upon its composition.

Having disposed of the German colonies, the treaty turns to those countries where Germany had acquired special rights and privileges, which she is also condemned to lose.

CHINA.—Under the treaty China stands to gain from Germany the rights and indemnities resulting from the Boxer settlement; all property of the German Government in the concessions of Tientsin, Hankow or elsewhere; however, consular and diplomatic residences are not included. The ancient astronomical instruments carried away from Peking in 1900-1901 are to be returned at German expense; the leases from China under which the German concessions at Tientsin and Hankow are held are to be abrogated; these areas are to be then opened to international trade; all claims against China for the internment of German nationals and their repatriation are waived; claims

growing out of the capture of German ships and the seizure of German property are renounced; some slight further renunciations in favor of Great Britain and France close the chapter.

**SIAM and LIBERIA.**—These little states were technical belligerents and thus come in for their share of gain at German expense. German treaties, carrying rights and privileges with both, are terminated. German Government property in Siam, except consular or legation premises, is ceded to that state and the extraterritorial rights which Germany had enjoyed in Siam are surrendered. The right to nominate a German receiver of customs in Liberia is renounced. Both states are protected against possible claims arising from their treatment of German ships and nationals during the war. As for debts and property owned by Germans in both states, they are to be treated in accordance with the so-called Economic Clauses expressed at great length in Part X of the main treaty. This, in brief, establishes a clearing-house in which debts, contracts and property rights are to be liquidated and balanced.

**MOROCCO.**—By this section Germany loses all benefit of the Treaty of Algeciras; all arrangements with the Sherifian Empire are abrogated; the French Protectorate in Morocco is accepted.

**EGYPT.**—The British Protectorate proclaimed over Egypt in 1914 is recognized by Germany and her rights under the Capitulations renounced. British consular courts are given jurisdiction over German property and nationals until "an Egyptian law of judicial organization establishing courts of universal jurisdiction comes into force." Germany consents that Turkey's rights under the convention of 1888, relating to the free navigation of the Suez Canal, shall be transferred to Great Britain.

Such are the provisions of the Treaty of Versailles as affecting these extra-European belligerents. They strip Germany of all those rights and privileges which had been extorted in the course of the Empire's growth. No room is left, so far as the foresight of the negotiators could suggest, for claims and pressure and intrigue. The haughty preferential attitude of the old Germany changes to distinct inferiority. The dreams of colonial empire are gone.

These reflections are in harmony with the idea of a defensive treaty with which this discussion started. But there is another and serious aspect of the surrender of her colonies by Germany which the economist rather than the publicist must consider. For every bit of

the raw material and colonial produce which enters into German manufacturing or German consumption, she must hereafter be dependent upon non-German sources. This is a heavy blow to her commercial prosperity, and likely to result in wide-reaching emigration to South American and other states. The future consequences of such constrained colonization form an interesting subject of speculation.

THEODORE S. WOOLSEY.

SOME OF THE FINANCIAL CLAUSES OF THE PEACE TREATY WITH  
GERMANY

Part IX of the Treaty of Peace concluded at Versailles June 28, 1919, embodies the so-called "Financial Clauses," embracing Articles 248 to 263, both inclusive. These clauses appear to deal primarily with four general sets of problems: first, the cost of reparation incurred by the Allied and Associated Powers; secondly, the effect of the cession of Germany territory upon the public debts of the grantor; thirdly, the nature and treatment of property passing by cession; and fourthly, the preservation and acquisition by Germany, and transfer to the Allied and Associated Powers, of moneys and certain other assets. Other important matters are also dealt with, such as, for example, the confirmation of the surrender of all material surrendered to those Powers pursuant to the terms of the armistice of November 11, 1918, and later armistice agreements, and the credits to be allowed therefrom (Article 250). There is also acknowledged (in Article 252) the right of each of those Powers to dispose of enemy assets and property within its jurisdiction at the date of the coming into force of the treaty. There is a declaration saving from prejudice, through the operation of previous provisions, mortgages of German public or private origin, in favor of the Allied and Associated Powers or their nationals, and perfected before the war (Article 253).

The principle that a first charge upon the assets and revenues of the German Empire and its constituent States is to be the cost of reparation and all other costs arising under the treaty or other agreements supplementary to it, is acknowledged and applied with care (Articles 248, 249, 251).

Of much importance and great interest are the arrangements for the public debts pertaining to ceded territory.

According to Article 254, the Powers to which German territory is ceded shall, subject to qualifications made in Article 255, undertake to pay:

1. A portion of the debt of the German Empire as it stood on the 1st of August, 1914, calculated on the basis of the ratio between the average for the three financial years 1911, 1912, 1913, of such revenues of the ceded territory, and the average for the same years of such revenues of the whole German Empire as in the judgment of the Reparation Commission are best calculated to represent the relative ability of the respective territories to make payments.

2. A portion of the debt as it stood on the 1st of August, 1914, of the German State to which the ceded territory belonged, to be determined in accordance with the principle stated above.

Such portions shall be determined by the Reparation Commission.

It is also provided that the method of discharging the obligation both in respect of capital and interest, so assumed, shall be fixed by the Reparation Commission, and that such method may take the form, *inter alia*, of the assumption by the Power to which the territory is ceded of Germany's liability for the German debt held by her nationals. Should, however, the method adopted involve any payments to the German Government, it is declared that such payments are to be transferred to the Reparation Commission on account of sums due for reparation so long as any balance in respect of such sums remains unpaid.

Article 255 embraces certain exceptions to the above provisions. Inasmuch as, in 1871, Germany refused to undertake any portion of the burden of the French debt, France is to be exempt from any payments in respect to Alsace-Lorraine. In the case of Poland, that portion of the debt which, in the opinion of the Reparation Commission, is attributable to the measures taken by the German and Prussian Governments "for the German colonization of Poland" is to be excluded from the apportionment. Again, in all ceded territories other than Alsace-Lorraine, that portion of the debt of the German Empire or German States which in the opinion of the Reparation Commission represents expenditures by the governments thereof upon government properties (respecting the transfer of which provision is made in Article 256), is to be excluded from the apportionment. The reason for this last exclusion is that such properties are to pass

to the grantees and paid for by them to the Reparation Committee to the credit of the German Government on account of the sums due for reparation (Article 256).

The foregoing provisions of Articles 254 and 255 are based on the simple theory that the effect of a change of sovereignty by cession should be to cause the apportionment of the debts of the grantor. The application of this principle to the general as well as essentially local indebtedness of the grantor is due to the circumstance that the former may be normally deemed to be as closely and beneficially connected with the territory transferred as with that retained by the former sovereign.<sup>1</sup>

It would appear to be unjust to permit the transferee to gain the benefits accruing to the territory acquired from the use of borrowed funds unless the obligation to make repayment were undertaken. It is believed that the treaty, although not without precedent, marks a decided step forward, in its respect for a theory concerning which the publicists have heretofore oftentimes betrayed confusion of thought and yielded to **unconvincing reasoning**.

Obviously, the doctrine of apportionment suggests the limits of its own application. Whatever indebtedness is shown to be adverse to the welfare of the territory ceded, is not so related to it as to pass as a fiscal burden to the grantee. This limitation is closely observed in the foregoing articles of the treaty. It is well brought out in the exception as to indebtedness incurred for the German colonization of Poland. Doubtless the limitation excluding from apportionment German expenditures, both imperial and state, on governmental properties is of wide scope. But this does not signify, as has been observed, that the transferees, in cases where the limitation is made applicable, acquire those properties as a free gift or as the fruits of conquest. The case of Alsace-Lorraine, for reasons stated in the treaty, stands by itself.

According to Article 256, "all property and possessions" situated in German territory and belonging to the German Empire or to the German States, pass to the Powers to which German territory is ceded. The value of these acquisitions is to be fixed by the Reparation Commission, and, as has been noted, paid by the State acquiring the

<sup>1</sup> See opinion of Mr. Justice Holmes, in behalf of the Supreme Court of the United States in the case of *Virginia v. West Virginia*, 220 U. S. 1, 29-30, this JOURNAL, Vol. 5, p. 523.

territory to that commission for the credit of the German Government on account of the sums due for reparation. The property thus described is deemed to include all the property of the Crown, the Empire or the States, and the private property of the former German Emperor and other royal personages. In a word, the cession embraces every form of property, but subject to payment to be credited in diminution of the sums which, by way of reparation, Germany is obliged to undertake to pay. Such payments or credits are, however, excepted in the case of property in Alsace-Lorraine (by reason of the terms of the cession of that territory to Germany in 1871), and in that of property in land ceded to Belgium.

According to Article 257, all property and possessions belonging to the German Empire or the German States, within any of the former German territories, including colonies, protectorates or dependencies, administered by a mandatory (under the terms of the Covenant of the League of Nations), are to be transferred with the territories to the mandatory Power in its capacity as such, and no payment is to be made or credit given "to those governments" in consideration of the transfer. It should be observed that this article is outside of the scope of the limitations announced in Article 255 concerning the apportionment of the public debt, and is unrelated to that matter.

While the several cessions are rendered broadly comprehensive with respect to the amount and kinds of property to pass to the grantee, the duty imposed upon the latter to pay for what is transferred is apparently adjusted according to the equities of the particular grantee as against the grantor, and especially as derived from the former relation of the grantee to the property ceded. In measuring such equities, claims based upon prescription appear to be little heeded, save as they establish a title more respectable than one derived from conquest.

The extent to which the provisions for the apportionment of the public indebtedness of the grantor as it stood on August 1, 1914, may in fact serve to promote respect for international justice, will correspond precisely to the spirit and determination with which the Reparation Commission undertakes to fulfil its task. In view of the terms of the treaty as expressed in Articles 254 and 255, it is given to that body to develop a practice which is sound in theory, not unjust to grantee or grantor, and therefore, not conducive to inter-

national controversy. All must hope that the commission, although not a judicial tribunal, will seize the opportunity so to exercise its vast discretionary powers as to convince enlightened sentiment in every land that the States victorious in the war remain steadfast to the fundamental principles of justice and for the sake of which they unsheathed the sword.

CHARLES CHENEY HYDE.

#### THE NEW ANGLO-PERSIAN AGREEMENT

On August 9, 1919, there were signed at Teheran two agreements between Great Britain and Persia which have been subjected to some severe criticism.<sup>1</sup>

As stated in the preamble, the main agreement was concluded "in virtue of the close ties of friendship which have existed between the two governments in the past, and in the conviction that it is in the essential and mutual interest of both in future that these ties shall be cemented, and that the progress and prosperity of Persia should be promoted to the utmost."

In the body of the first agreement the British Government gives the following undertakings:

(1) It "reiterates, in the most categorical manner, the undertakings which they have repeatedly given in the past to respect absolutely the independence and integrity of Persia."

(2) It promises to "supply, at the cost of the Persian Government, the services of whatever expert advisers may, after consultation between the two governments, be considered necessary for the several departments of the Persian administration. These advisers shall be engaged on contracts and endowed with adequate powers,

<sup>1</sup> This agreement was published September 11, 1919, as Senate Document No. 90, 66th Congress, 1st session. This document also includes a subsidiary agreement between the two governments relating to a loan of £2,000,000 at 7%; Article 5 of a contract between the Persian Government and the Imperial Bank of Persia, relating to the Persian Government 5% loan of £1,250,000 of May 8, 1911; and two notes by Sir P. Cox, the British Minister at Teheran, to His Highness Vossug-ed-Dowleh, the Persian Prime Minister.

the nature of which shall be the matter of agreement between the Persian Government and the advisers."

(3) It agrees to "supply, at the cost of the Persian Government, such officers and such munitions and equipment of modern type as may be adjudged necessary by a joint commission of military experts, British and Persian, which shall assemble forthwith for the purpose of estimating the needs of Persia in respect of the formation of a uniform force which the Persian Government proposes to create for the establishment and preservation of order in the country and on its frontiers."

(4) "For the purpose of financing the reforms indicated in clauses 2 and 3 of this agreement, the British Government offer to provide or arrange a substantial loan for the Persian Government, for which adequate security shall be sought by the two governments in consultation in the revenues of the customs or other sources of income at the disposal of the Persian Government. Pending the completion of negotiations for such a loan the British Government will supply on account of it such funds as may be necessary for initiating the said reforms."

(5) "The British Government, fully recognizing the urgent need which exists for the improvement of communications in Persia, with a view both to the extension of trade and the prevention of famine, are prepared to cooperate with the Persian Government for the encouragement of Anglo-Persian enterprise in this direction, both by means of railway construction and other forms of transport; subject always to the examination of the problems by experts and to agreement between the two governments as to the particular projects which may be most necessary, practicable and profitable."

(6) "The two governments agree to the appointment forthwith of a joint committee of experts for the examination and revision of the existing customs tariff with a view to its reconstruction on a basis calculated to accord with the legitimate interests of the country and to promote its prosperity."

The second agreement provides for a loan of £2,000,000 sterling by the British to the Persian Government on such terms as are customary in these cases. The rate of interest—7% payable monthly—might in certain quarters be deemed somewhat usurious. The securities for this loan are thus described in Article 3 of the second agreement:



All the revenues and customs receipts assigned in virtue of the contract of May 8, 1911,<sup>2</sup> for the repayment of the loan of £1,250,000 are assigned for the repayment of the present loan with continuity of all conditions stipulated in the said contract, and with priority over all debts other than the 1911 loan and subsequent advances made by the British Government. In case of insufficiency of the receipts indicated above, the Persian Government undertakes to make good the necessary sums from other resources, and for this purpose the Persian Government hereby assigns to the service of the present loan, and of the other advances above mentioned, in priority and with continuity of conditions stipulated in the aforesaid contract, the customs receipts of all other regions, in so far as these receipts are or shall be at its disposal.

It is further provided in Article 4 that the "Persian Government will have the right of repayment of the present loan at any date out of the proceeds of any British loan which it may contract for."

There are added to the texts of these agreements two letters, dated August 9, 1919, from Sir P. Cox, the British Minister at Teheran, to the Persian Prime Minister. Of these letters, one conveys the assurance to Persia of British coöperation in securing the "revision of treaties actually in force between the two Powers," "compensation for material damages suffered at the hands of other belligerents," and "rectification of the frontier of Persia at the points where it is agreed upon by the parties to be justifiable." The other letter assures the Persian Government that Great Britain will not claim the cost of maintenance of British troops sent into Persia for the defence of her neutrality, and requests a similar assurance that the Persian Government will not claim indemnity for damage done by British troops in Persian territory.

It is stated that these agreements are the result of negotiations which had been in progress for nine months at the time of the signing of the treaty, *i.e.*, they were begun before the Peace Conference had commenced its labors at Paris and therefore before the Covenant for a League of Nations existed even on official paper. This would seem to dispose of the charge that they constitute a violation of the Covenant of the League of Nations, in spirit at least.

To this charge Lord Curzon has thus replied:<sup>3</sup>

He had also seen it stated in some quarters that the agreement was a disparagement or deliberate neglect of the League of Nations to which most of us

<sup>2</sup> For these securities, see No. 3 of the Senate Document, included in it for the purpose of reference.

<sup>3</sup> See *London Times*, September 19, 1919.

looked forward with such keen anticipation as one agency which might save us in future from the horrors of recent events. He contended that this was not the case. He said emphatically, and on behalf of the British Government, and after conversation with his Highness that afternoon, that both the British Government and the Persian Government accepted unreservedly Articles 10 and 20 of the Covenant. When the Treaty of Peace was ratified, and as soon as the Council of the League of Nations came into effective existence, it was the intention of both governments to communicate the agreement to the Council of the League, with a full explanation and defence of its conditions.

The publication of the Anglo-Persian Agreement is said to have been received with some annoyance in France, and has even disturbed the wonted serenity of some of the spirits in the Senate of the United States. It is of course seized upon by certain radical and so-called "liberal" elements in all countries as another evidence of British hypocrisy and imperialism.

However, there appears to be nothing in this agreement which need seriously disturb us. The independence and integrity of Persia are recognized in the most absolute and categorical manner, and we see no reason for questioning the good faith of Great Britain in this matter. To be sure, Persia may go the way of Egypt<sup>4</sup> and Korea, but she may also go the way of Canada and Australia. The direction in which she moves will largely depend upon her own capacity (or the lack of it) for progress and self-government.

In these agreements the form of a Protectorate has been carefully avoided. As observed by Lord Curzon:

Great Britain had always respected the integrity of Persia, and, as regarded the political and national independence of that country, he contended that it was of British as well as Persian interest. Our main interest in Persia was its independence. We did not want Persia to be a mere buffer against our enemies; we wanted her to be a bulwark for the peace of the world. Great Britain had never asked for a mandate for Persia. Had it been offered we should not have accepted it. Great Britain preferred to treat with Persia as a partner, on equal terms.

In some quarters suspicion had been aroused as to the real character of the agreement. This arose in the main from a misconception. It was stated that the agreement amounted to a protectorate by Great Britain over Persia. But that was not the case. He would have opposed any idea of a protectorate as contrary to our repeated engagements, and he would have opposed it in the last

<sup>4</sup> In any comparison between the cases of Egypt and Persia, it should not be forgotten that Great Britain has never promised or recognized the "independence" of Egypt.

resort, because he would have regarded it as inimical to British interests. As a result of the war, Great Britain would have enough to do in the eastern part of the world without assuming the responsibility of a protectorate over Persia.

Those who believed that Great Britain, as a result of this agreement, was going to sit down in Persia to Anglicize or Indianize or Europeanize it were grossly mistaken. All they wanted to do was to give Persia expert assistance and financial aid which would enable her to carve out her own fortune as an independent and still living country.<sup>5</sup>

But whatever be the present intention of the British Government or the legal aspect of the question, it is useless to disguise the fact that in all human probability Persia will remain *de facto* under the virtual protection of Great Britain for an indefinite time to come.

How, indeed, could it be otherwise under the circumstances?

For a century or more the relations between Great Britain and Persia have been particularly intimate. During a considerable portion of this period Russia also exercised a strong political influence in Persia. The dangers lurking in the increasing rivalry between these two Powers were at least temporarily overcome by the Anglo-Russian Convention of 1907.

By the first "Arrangement" of the Convention of 1907,<sup>6</sup> Persia was divided into three spheres of influence—the British sphere to the south on the seacoast so beloved of Great Britain; the northern or Russian sphere; and an irregular neutral zone lying between these two sections.

The collapse of Russia and the events of the Great War have apparently left Great Britain in sole occupation of Persia, in sore need of defender and guardian. This weak and helpless country stands in need of about everything essential to national well-being and success.

In the first place, she needs protection both against internal disorder and external aggression. It is well to cry out against imperialism and the unscrupulous designs of self-seeking and aggressive nations. But is it also well in pursuit of a *laissez-faire* and anti-imperial-

<sup>5</sup> *Op. cit.*

<sup>6</sup> For a discussion and analysis of this convention, see editorial in this JOURNAL for 1907, Vol. 1, Pt. 2, pp. 979 ff. For the text of the convention, see Supplement to this JOURNAL for 1907. For subsequent events, see editorial on "England and Russia in Central Asia" in this JOURNAL for 1909, Vol. III, pp. 170 ff.

istic policy to leave them a prey to the forces of aggression and chaos? Then Persia needs financial support as well as good administration. Above all, she needs roads and railways. Under the old Russian dispensation she was not permitted to construct a single railway.

So far as British interests are concerned, it is unnecessary to point out the importance of securing, free from molestation, this great highway between Mesopotamia and India. And we do not see that these interests conflict in any way with the great aim of securing and maintaining the peace of the world. In fact we believe this end is best furthered by the predominance of British interests (the greatest of which is peace) in this quarter of the globe.

As Lord Curzon well says on this head:

In looking to the future, nothing seemed to him more certain than that a time of great trouble and unforeseen developments lay before the nations of the world. He doubted very much whether, as the result of the war, we had succeeded in pacifying Europe. But whether we had done so or not, it was quite certain that we should not for some time secure stability in Asia. The break up of the Russian and Turkish Empires had produced a vacuum which it would take a long time to fill by settled and orderly conditions. The rise of Bolshevism had introduced a new and disturbing element, and it might be that in escaping the dangers of the recent war we might be confronted by a peril even more serious in the future. If that forecast were not over-gloomy, if it were correct, nothing could be worse for the peace of Asia, and indeed for the peace of the world, than that there should exist in the heart of the Middle East a state which by reason of its weakness became a possible center of intrigue and the focus of disorder.

What they wanted to secure, if possible, was a solid block in which reasonable, tranquil and orderly political conditions would prevail, from Burma on the east to Mesopotamia on the west. So far as Great Britain was responsible, she would devote herself to that task. If that end was a right and reasonable end, it was necessary and vital that Great Britain and Persia work together in order to secure it. Great Britain and Persia were jointly prepared to defend that agreement, and they looked forward to the vindication of its real character by its success.<sup>7</sup>

May this Agreement assist materially in ushering in a new era for Persia as well as aid in stabilizing Asia and thus maintaining the peace of the world!

AMOS S. HERSHEY.

<sup>7</sup> *Op. cit.*

## JEWISH NATIONALISM

The principle of the "right of self-determination" has not yet been clearly defined or accompanied by guiding rules for its application. One result has been the discovery of "nations crowding to be born"—of the existence of national self-consciousness where unsuspected, and of confused racial situations, as in Hungary—where no practical rules could be devised to insure without discrimination this right of self-determination.

There has been no attempt to limit the application of this principle either in a political or in a historical sense. There has been no indication to what an extent historic wrongs might properly be righted. The privilege of raising embarrassing questions concerning the rights of the Egyptians, of the Irish, of the Filipinos and the negroes, not to mention other nationalistic problems, has in no way been circumscribed. Apparently there is no limit to the tendency to undermine the foundations of existing political arrangements. Everything is subject to challenge and revision: a situation that presages many years of uncertainty and unrest.

One of the most interesting nationalistic problems raised by this war is that of Jewish claims to Palestine. The Zionist movement of course has long favored the return of Jewish colonists to the home of the race. But this movement had no political significance until after the famous declaration on the subject by Mr. Balfour, British Secretary for Foreign Affairs, in November, 1918, following the occupation of Jerusalem by General Allenby's forces. This declaration was addressed to Lord Rothschild, the leading representative of Jews in England, and read as follows:

The Government view with favor the establishment of Palestine as a national home for the Jewish people, and will use their best endeavors to facilitate the achievement of this object, it being clearly understood that nothing will be done that may prejudice the civil or religious rights of existing non-Jewish communities in Palestine.

The effect of this declaration on the scattered members of the Jewish race was almost dramatic. To many it was the realization of Talmudic prophecies; to Zionists the achievement of their dearest hopes; and to all Jews a historic event appealing poignantly to their emotions.

The Zionists were quick to follow up this important declaration

by the adoption of plans for the immediate penetration of Palestine under the ægis of British military occupation. A British Zionist Commission was organized with the consent and active coöperation of the Government to proceed to Palestine for purposes of investigation and counsel. A few foreign representatives were permitted to be added, one of whom, Mr. Walter Myer, was an American.

This commission reached Palestine early in April, 1918, and proceeded to play a most active rôle. Among other things, it concerned itself in the administration of relief to needy Jews, in organizing Jewish civic communities, in advising with the military authorities, in political negotiations of a varied character, and in investigating conditions generally. One of the most impressive acts of the commission was the laying of the foundation-stone of a Jewish university on a spur of the Mount of Olives. Instruction in this institution is to be entirely in Hebrew, and is to be open to all nationalities.

The commission was particularly preoccupied with political questions affecting the Moslems and the Christians, who had become greatly perturbed over the prospective establishment of a Jewish State. The Zionists endeavored to allay these fears by assurances to the effect that they did not seek political independence, but desired merely freedom for Jews to settle in Palestine under the protection of a liberal régime such as Great Britain would afford. They interpreted the words "national home" used by Balfour as having only a moral and ethical sense, and as having no political significance whatever. These efforts were apparently without success, as the Moslems and Christians have made common cause in refusing to sell any more land to Jews and in generally antagonizing the plans of the Zionists.

Despite the protestations of some Zionists, there can be no doubt about the awakening of Jewish national self-consciousness as a result of the declaration by Balfour. The attempt to limit the meaning of "national home" has failed, and most Zionists now advocate openly the foundation of a "Jewish State." The arguments in behalf of this scheme stress not so much the need of an asylum for oppressed Jews, as they do the need of a national rallying point. The heart of Zionism seems to be the preservation of the solidarity and integrity of the Jewish race. Its main objective is to arrest the process of assimilation of Jews throughout the world by reviving their sentiment of loyalty to the old home of their race.

As has been pointed out, the principle of the right of self-determination has not been so clearly defined as to indicate to what extent historic wrongs may be righted. It would not appear reasonable, however, to attempt to revive claims reverting eighteen hundred years ago. The dispersal of the Jews was so complete as to make it impossible for them to maintain even the nucleus of a national culture or preserve any real historic continuity. What militates more forcibly still against the demand for a Jewish State is the fact that Palestine has come to have a very special significance for Christians and Moslems as well as for the Jews. It is truly a "holy land," for them all; and no one sect or race can now claim with justice any special privileges.

It is this fact of the international significance of Palestine that makes it impossible to consider Jewish nationalistic claims on a par with the claims, say, of the Poles, the Czechs, or of the Albanians. The right of self-determination in these instances does not encounter the difficulties of a religious and of a historic character that it does in the case of the Jews. The problem is unique and can only be solved in some unique fashion. The solution, however, might not be as difficult as would now appear, provided all parties were willing to concede the international significance of Palestine. In this age of "internationalism" there could hardly be found a more suitable spot for the practical application of the idea of internationalization than in the land revered by the three great theistic religions which have exerted so profound an influence on the world.

If the Jewish race is determined to resist all assimilative tendencies and to preserve its integrity, and is not satisfied with the internationalization of Palestine, there would seem to be but one other alternative, namely, in a much larger spirit of tolerance and a more liberal attitude on the part of nations toward the foreigner within their gates. Modern ideas of sovereignty have been much affected by feudal notions to the effect that "a man was possessed by the land"; and has identified national jurisdiction with territory. Lorimer once pointed out that the idea of a nation without territory, as in the case of the Jews and the Gypsies, was not utterly unreasonable, provided they were permitted to preserve their peculiar institutions under a régime of the character such as has prevailed in Turkey, Persia, Siam, China, and elsewhere. Under the "extritorial" or "personal" theory of sovereignty, great concessions might be made to the

peoples of many nationalities who wished to preserve their own national and racial ideals, provided, of course, that these ideals in no way imperilled the morals and public security of the sovereign state granting these concessions.

It is doubtless too much to expect so liberal and tolerant an attitude among nations today. In spite of many internationalizing agencies, most nations today are still more or less chauvinistic, and, in a sense, bigoted in their jealous adherence to their own ways and ideas. But it is this very fact that makes the need for mutual toleration all the greater. Nowhere is this need more apparent than in the case of the Jew. He must either seek a "national home," or obtain a much greater measure of tolerance than has yet been accorded to his race or any other race, or he must reconcile himself to the gradual loss of his racial identity. These are the alternatives before him. The problem of the right of self-determination in the case of the Jew is by all odds the most baffling of the many nationalistic claims now clamoring for recognition. It is not strange that the Peace Conference in Paris has been unable to find a solution.

PHILIP MARSHALL BROWN.



## CURRENT NOTES

MESSAGE OF PRESIDENT WILSON TRANSMITTING TO THE SENATE THE  
TREATY WITH FRANCE OF JUNE 28, 1919.<sup>1</sup>

GENTLEMEN OF THE SENATE:

I take pleasure in laying before you a treaty with the Republic of France, the object of which is to secure that Republic of the immediate aid of the United States of America in case of any unprovoked movement of aggression against her on the part of Germany. I earnestly hope that this treaty will meet with your cordial approval and will receive an early ratification at your hands, along with the treaty of peace with Germany. Now that you have had an opportunity to examine the great document I presented to you two weeks ago, it seems opportune to lay before you this treaty which is meant to be in effect a part of it.

It was signed on the same day with the treaty of peace and is intended as a temporary supplement to it. It is believed that the treaty of peace with Germany itself provides adequate protection to France against aggression from her recent enemy on the east; but the years immediately ahead of us contain many incalculable possibilities. The Covenant of the League of Nations provides for military action for the protection of its members only upon advice of the Council of the League—advice given, it is to be presumed, only upon deliberation and acted upon by each of the governments of the member states only if its own judgment justifies such action. The object of the special treaty with France which I now submit to you is to provide for immediate military assistance to France by the United States in case of any unprovoked movement of aggression against her by Germany without waiting for the advice of the Council of the League of Nations that such action be taken. It is to be an arrangement, not independent of the League of Nations, but under it.

It is, therefore, expressly provided that this treaty shall be made the subject of consideration at the same time with the treaty of peace

<sup>1</sup> Senate Document No. 63, 66th Congress, 1st session.

with Germany; that this special arrangement shall receive the approval of the Council of the League; and that this special provision for the safety of France shall remain in force only until, upon the application of one of the parties to it, the Council of the League, acting, if necessary, by a majority vote, shall agree that the provisions of the Covenant of the League afford her sufficient protection.

I was moved to sign this treaty by considerations which will, I hope, seem as persuasive and as irresistible to you as they seemed to me. We are bound to France by ties of friendship which we have always regarded, and shall always regard, as peculiarly sacred. She assisted us to win our freedom as a nation. It is seriously to be doubted whether we could have won it without her gallant and timely aid. We have recently had the privilege of assisting in driving enemies, who were also enemies of the world, from her soil; but that does not pay our debt to her. Nothing can pay such a debt. She now desires that we should promise to lend our great force to keep her safe against the power she has had most reason to fear. Another great nation volunteers the same promise. It is one of the fine reversals of history that that other nation should be the very Power from whom France fought to set us free. A new day has dawned. Old antagonisms are forgotten. The common cause of freedom and enlightenment has created new comradeships and a new perception of what it is wise and necessary for great nations to do to free the world of intolerable fear. Two governments who wish to be members of the League of Nations ask leave of the Council of the League to be permitted to go to the assistance of a friend whose situation has been found to be one of peculiar peril, without awaiting the advice of the League to act.

It is by taking such pledges as this that we prove ourselves faithful to the utmost to the high obligations of gratitude and tested friendship. Such an act as this seems to me one of the proofs that we are a people that sees the true heart of duty and prefers honor to its own separate course of peace.

WOODROW WILSON.

THE WHITE HOUSE, *July 29, 1919.*

STATEMENT OF PRESIDENT WILSON REGARDING THE DISPOSITION  
OF FIUME<sup>1</sup>PARIS, *April 23, 1919.*

In view of the capital importance of the questions affected, and in order to throw all possible light upon what is involved in their settlement, I hope that the following statement will contribute to the final formation of opinion and to a satisfactory solution.

When Italy entered the war she entered upon the basis of a definite, but private, understanding with Great Britain and France, now known as the Pact of London. Since that time the whole face of circumstances has been altered. Many other Powers, great and small, have entered the struggle, with no knowledge of that private understanding. The Austro-Hungarian Empire, then the enemy of Europe and at whose expense the Pact of London was to be kept in the event of victory, has gone to pieces and no longer exists. Not only that. The several parts of that Empire, it is now agreed by Italy and all her associates, are to be erected into independent states and associated in a League of Nations, not with those who were recently our enemies, but with Italy herself and the Powers that stood with Italy in the great war for liberty. We are to establish their liberty as well as our own. They are to be among the smaller states whose interests are henceforth to be as scrupulously safeguarded as the interests of the most powerful states.

The war was ended, moreover, by proposing to Germany an armistice and peace which should be founded on certain clearly defined principles which should set up a new order of right and justice. Upon those principles the peace with Germany has been conceived, not only, but formulated. Upon those principles it will be executed. We cannot ask the great body of Powers to propose and effect peace with Austria and establish a new basis of independence and right in the states which originally constituted the Austro-Hungarian Empire and in the states of the Balkan Group on principles of another kind. We must apply the same principles to the settlement of Europe in those quarters that we have applied in the peace with Germany. It was upon the explicit avowal of those principles that the initiative

<sup>1</sup> *Chicago Tribune*, Paris Edition, Thursday, April 24, 1919, p. 1.

for peace was taken. It is upon them that the whole structure of peace must rest.

If those principles are to be adhered to, Fiume must serve as the outlet and inlet of the commerce, not of Italy, but of the lands to the north and northeast of that port: Hungary, Bohemia, Roumania, and the states of the new Jugo-Slavic group. To assign Fiume to Italy would be to create the feeling that we had deliberately put the port upon which all these countries chiefly depend for their access to the Mediterranean in the hands of a Power of which it did not form an integral part and whose sovereignty, if set up there, must inevitably seem foreign, not domestic or identified with the commercial and industrial life of the regions which the port must serve. It is for that reason, no doubt, that Fiume was not included in the Pact of London, but there definitively assigned to the Croatsians.

And the reason why the line of the Pact of London swept about many of the islands of the eastern coast of the Adriatic and around the portion of the Dalmatian coast which lies most open to that sea was not only that here and there on those islands and here and there on that coast there are bodies of people of Italian blood and connection, but also, and no doubt, chiefly, because it was felt that it was necessary for Italy to have a foothold amidst the channels of the eastern Adriatic in order that she might make her own coasts safe against the naval aggression of Austria-Hungary. But Austria-Hungary no longer exists. It is proposed that the fortifications which the Austrian Government constructed there shall be razed and permanently destroyed. It is part, also, of the new plan of European order which centers in the League of Nations that the new states erected there shall accept a limitation of armaments which puts aggression out of the question. There can be no fear of the unfair treatment of groups of Italian people there because adequate guarantees will be given, under international sanction, of equal and equitable treatment of all racial or national minorities.

In brief, every question associated with this settlement wears a new aspect,—a new aspect given it by the very victory for right for which Italy has made the supreme sacrifice of blood and treasure. Italy, along with the four other great Powers, has become one of the chief trustees of the new order which she has played so honorable a part in establishing.

And on the north and northeast her natural frontiers are com-

pletely restored, along the whole sweep of the Alps from northwest to southeast to the very end of the Istrian peninsula, including all the great watershed within which Trieste and Pola lie and all the fair regions whose face nature has turned towards the great peninsula upon which the historic life of the Latin people has been worked out through centuries, of famous story every since Rome was first set upon her seven hills. Her ancient unity is restored. Her lines are extended to the great walls which are her natural defence. It is within her choice to be surrounded by friends; to exhibit to the newly liberated peoples across the Adriatic that noblest quality of greatness, magnanimity, friendly generosity, the preference of justice over interest.

The nations associated with her, the nations that know nothing of the Pact of London or of any other special understanding that lies at the beginning of this great struggle and who have made their supreme sacrifice also in the interest, not of national advantage or defence, but of the settled peace of the world, now unite with her older associates in urging her to assume a leadership which cannot be mistaken in the new order of Europe.

America is Italy's friend. Her people are drawn, millions strong, from Italy's own fair countrysides. She is linked in blood as well as in affection with the Italian people. Such ties can never be broken. And America was privileged, by the generous commission of her associates in the war, to initiate the peace we are about to consummate,—to initiate it upon terms she had herself formulated, and in which I was her spokesman. The compulsion is upon her to square every decision she takes a part in with those principles. She can do nothing else. She trusts Italy, and in her trust believes that Italy will ask nothing of her that cannot be made unmistakably consistent with these sacred obligations. Interest is not now in question, but the rights of peoples, of states new and old, of liberated peoples and peoples whose rulers have never accounted them worthy of right; above all the right of the world to peace and to such settlements of interest as shall make peace secure.

These, and these only, are the principles for which America has fought. These, and these only, are the principles upon which she can consent to make peace. Only upon these principles, she hopes and believes, will the people of Italy ask her to make peace.

REPLY OF SIGNOR ORLANDO, PREMIER OF ITALY, REGARDING THE  
DISPOSITION OF FIUME<sup>1</sup>PARIS, *April* 24, 1919.

Yesterday, while the Italian delegation was assembled discussing an alternative proposal sent to it from the British Prime Minister, which had as object the conciliation of the opposing tendencies manifested on the subject of the Italian territorial aspirations, the Paris newspapers published a message from Mr. Wilson, the President of the United States, in which he expressed his own opinion in regard to some of the most serious problems that have been submitted to the judgment of the Conference.

The employment of a direct appeal to the different peoples is certainly an innovation in international relations. It is not my intention to complain about it, but I take official notice of it in order to follow this principle in my turn, inasmuch as this new system without doubt will contribute to giving the peoples a broader participation in international questions, and inasmuch as I have always personally been of the opinion that such participation was a sign of a new era. However, if such appeals are to be considered as being addressed to peoples outside of the governments which represent them, I should say, almost in opposition to their governments, I should have great regret in calling to mind that this procedure, which, until now, has been used only against enemy governments, is today for the first time being used against a government which has been, and counts on remaining, a loyal friend of the great American Republic—against the Italian Government.

I could also complain that such a message, addressed to the people, has been published at the very moment when the Allied and Associated Powers were negotiating with the Italian Government, that is to say, with the very government whose participation had been solicited and appreciated in numerous and serious questions which, up to now, had been dealt with in intimate and complete solidarity.

To oppose, so to speak, the Italian Government and people would be to admit that this great free people could submit to the yoke of a will other than its own, and I shall be forced to protest vigorously against such suppositions, unjustly offensive to my country.

<sup>1</sup> *New York Herald*, Paris Edition, April 25, 1919, p. 1.

I now come to the contents of the President's message: it is devoted entirely to showing that the Italian claims, beyond certain limits defined in the message, violate the principles upon which the new régime of liberty and justice among peoples must be founded. I have never denied these principles, and President Wilson will do me the justice to acknowledge that in the long conversations which we have had, I have never relied on the formal authority of a treaty by which I knew very well that he was not bound. In these conversations I have relied solely on the force of reason and justice upon which I have always believed and still believe the aspirations of Italy are solidly based. I have not had the good fortune of convincing him: I regret it sincerely, but President Wilson himself has had the kindness to recognize, in the course of our conversations, that truth and justice are the monopoly of no one, and that all men are subject to error.

While remarking that more than once the Conference has been brought to change its sentiments radically when it was a question of applying these principles, I do not believe that I am showing disrespect towards this high assembly. On the contrary, these changes have been, and still are, the consequence of all human judgment. I mean to say only that experience has proved all the difficulties which are met in the application of these principles of an abstract nature to infinitely complex and varied concrete cases. Thus, with all deference, but all firmness, I consider the application made by President Wilson in his message of his principles to Italian claims is unjustified.

It is impossible for me, in a document of this nature, to repeat the detailed proofs which have been produced in great abundance. I shall only say that one cannot accept without reservation the statements according to which the downfall of the Austro-Hungarian Empire implies a reduction of the Italian aspirations. It is even permissible to believe the contrary, that is to say, that at the very moment when all the varied peoples which constituted that empire seek to organize themselves according to their ethnic and national affinities, the essential problem set by the Italian claims can and must be completely solved. Now this problem is that of the Adriatic, in which is summed up all the rights of Italy, both ancient and modern, all her martyrdom throughout the centuries and all the benefits which she is destined to bring to the great international community.

The presidential message affirms that with the concessions which

she has received Italy would attain the barrier of the Alps, which are her natural defences. This is a concession of vast importance on condition that the eastern flank of that barrier does not remain uncovered and that there be included among the rights of Italy the line from Monte Neveso separating the waters which flow toward the Black Sea from those which flow into the Mediterranean.

Without that protection a dangerous breach would remain open in that admirable natural barrier of the Alps, and it would mean the rupture of that unquestionable political, historical and economic unity constituted by the peninsula of Istria.

I believe, moreover, that he who can proudly claim that it was he who proclaimed to the world the right of self-determination of nations, is the very person who must recognize this right to Fiume, ancient city, which proclaimed its Italianity even before the Italian ships were near; to Fiume, admirable example of national consciousness perpetuated throughout the centuries. To deny it this right for the sole reason that it has to do only with a small community, would be to admit that the criterion of justice toward nations varies according to their territorial expansion. And if, to deny this right, we fall back on the international character of this port, we see Antwerp, Genoa, Rotterdam—all international ports serving as an outlet for a variety of nations and regions without their being obliged to pay dearly for this privilege by the suppression of their national consciousness.

And can one describe as excessive the Italian aspiration for the Dalmatian coast, this boulevard of Italy throughout the centuries, which Roman genius and Venetian activity have made noble and great, and whose Italianity, defying all manner of implacable persecution throughout an entire century, today shares with the Italian nation the same feelings of patriotism? In regard to Poland, the principle is held forth that denationalization obtained by violent and arbitrary methods cannot constitute rights. Why not apply the same principle to Dalmatia?

And if we wish to support this rapid synthesis of our good national rights by cold statistical facts, I believe I can state that among the various national reorganizations which the Peace Conference has already brought about or may bring about in the future, none of the reorganized peoples will count within its new frontiers a number of people of another race proportionately less than that which would



be assigned to Italy. Why, therefore, is it especially the Italian aspirations that are to be suspected of imperialistic cupidity?

Despite all these reasons, the history of these negotiations will demonstrate that the firmness which was necessary to the Italian delegation was always accompanied by a great spirit of conciliation in seeking the general agreement that we all wished for fervently.

The Presidential message ends by a warm declaration of friendship of America toward Italy. I answer in the name of the Italian people and I proudly claim this right and this honor, which is due to me as the man who in the most tragic hour of this war uttered to the Italian people the cry of resistance at all costs: this cry was heard and answered with a courage and abnegation of which few examples can be found in the history of the world. And Italy, thanks to the most heroic sacrifices of the purest blood of her children, has been able to climb from an abyss of misfortune to the radiant summit of the most brilliant victory. It is, therefore, in the name of Italy that, in my turn, I express the Italian people's sentiment of admiration and deep sympathy for the American people.

#### EFFECT OF RESERVATIONS AND AMENDMENTS TO TREATIES

*Extract from Speech of Hon. Frank B. Kellogg in the U. S. Senate, Thursday, August 7, 1919, on the Treaty of Peace with Germany.*<sup>1</sup>

The effect of reservations and amendments to treaties has been considered by the Supreme Court in a number of cases: *Doe v. Braden* (16 How. 622); *New York Indians v. United States* (170 U. S. 1); *Arkansas v. Kansas and Texas Coal Co.* (183 U. S. 185); the *Diamond Ring case* (183 U. S. 176).

In *Doe v. Braden* (16 How. 635), the effect of a reservation as to the validity of certain grants made by the King of Spain in Florida pending the negotiation of the treaty was considered, and Chief Justice Taney, writing the opinion of the court, said:

We have made this statement in relation to the negotiations and correspondence between the two governments for the purpose of showing the circumstances which occasioned the introduction of the eighth article, confirming Spanish grants made before the 24th of January, 1818, and annulling those made afterward; and also for the purpose of showing how it happened that the three large grants by

<sup>1</sup> Congressional Record, Vol. 58, No. 66, p. 3976, at p. 3981.

name were declared to be annulled in the ratification and not by a stipulation in the body of the treaty. But the statement is in no other respect material. For it is too plain for argument that where one of the parties to a treaty at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument or adding a new and distinct stipulation and the treaty is afterward ratified by the other party with the declaration attached to it and the ratifications duly exchanged, the declaration thus annexed is a part of the treaty and as binding and obligatory as if it were inserted in the body of the instrument. The intention of the parties is to be gathered from the whole instrument as it stood when the ratifications were exchanged.

In the case of *New York Indians v. United States* (170 U. S. 1), a reservation adopted by the Senate, which was not submitted to the Indian tribes or published by the President as a part of the treaty, was held not binding.

Mr. Justice Brown, writing the opinion of the court, said:

The power to make treaties is vested by the Constitution in the President and Senate, and, while this proviso was adopted by the Senate, there is no evidence that it ever received the sanction or approval of the President. It cannot be considered as a legislative act, since the power to legislate is vested in the President, Senate, and House of Representatives. There is something, too, which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case demand it. The proviso never appears to have been called to the attention of the tribes, who would naturally assume that the treaty, embodied in the presidential proclamation, contained all the terms of the arrangement. It is true that the proclamation recites that the Senate did, on March 25, 1840, resolve that the treaty "together with the amendments proposed by the Senate of the 11th of June, 1833, have been satisfactorily acceded to and approved of by said tribes," but, as the proclamation purported to set forth the treaty "word for word" as so amended, of course the amendments referred to were those embodied in the treaty as published in the proclamation.

In the case of *Fourteen Diamond Rings* (183 U. S. 176), a question similar to the one in *De Lima* against Bidwell arose. It appears that after the ratification of the treaty the Senate passed a resolution by vote of 26 to 22, as follows:

*Resolved, etc.,* That by the ratification of the treaty of peace with Spain it is not intended to incorporate the inhabitants of the Philippine Islands into citizenship of the United States, nor is it intended to permanently annex said islands as an integral part of the territory of the United States; but it is the intention of the United States to establish on said islands a government suitable

to the wants and conditions of the inhabitants of said islands to prepare them for local self-government, and in due time to make such disposition of said islands as will best promote the interests of the United States and the inhabitants of the said islands.

The court said:

We need not consider the force and effect of a resolution of this sort, if adopted by Congress, not like that of April 20, 1898, in respect of Cuba, preliminary to the declaration of war, but after title had passed by ratified cession. It is enough that this was a joint resolution; that it was adopted by the Senate by a vote of 26 to 22, not two-thirds of a quorum; and that it is absolutely without legal significance on the question before us. The meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it. What view the House might have taken as to the intention of the Senate in ratifying the treaty we are not informed, nor is it material; and if any implication from the action referred to could properly be indulged, it would seem to be that two-thirds of a quorum of the Senate did not consent to the ratification on the grounds indicated.

Mr. Justice Brown, in a concurring opinion, stated more in detail his reasons for not giving effect to the resolution:

It cannot be regarded as part of the treaty, since it received neither the approval of the President nor the consent of the other contracting power. A treaty in its legal sense is defined by Bouvier as "a compact made between two or more independent nations with a view to the public welfare" (2 Law Dic., 1136), and by Webster as "an agreement, league, or contract between two or more nations or sovereigns, formally signed by commissioners, properly authorized, and solemnly ratified by the sovereigns or the supreme power of each State."

In its essence it is a contract. It differs from an ordinary contract only in being an agreement between independent States instead of private parties. (*Foster v. Neilson*, 2 Pet., 253, 314; *Head Money Cases*, 112 U. S., 580.) By the Constitution (Art. II, sec. 2), the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." Obviously the treaty must contain the whole contract between the parties, and the power of the Senate is limited to a ratification of such terms as have already been agreed upon between the President, acting for the United States, and the commissioners of the other contracting power. The Senate has no right to ratify the treaty and introduce new terms into it, which shall be obligatory upon the other power, although it may refuse its ratification, or make such ratification conditional upon the adoption of amendments to the treaty. If, for instance, the treaty with Spain had contained a provision in stating the inhabitants of the Philippines as citizens of the United States, the Senate might have refused to ratify it until this provision was stricken out. But it could not, in my opinion, ratify the treaty and

then adopt a resolution declaring it not to be its intention to admit the inhabitants of the Philippine Islands to the privileges of citizenship of the United States. Such a resolution would be inoperative as an amendment to the treaty, since it had not received the assent of the President or the Spanish commissioners.

While this is the well-settled rule respecting amendments to treaties, it is also equally well settled that in case of ambiguity or doubt in the application of the terms of a treaty reference is frequently made to the contemporary declarations of the negotiators who framed the treaties and to prior negotiations, not to make a treaty where the parties have failed to do so, nor to change the terms of the treaty actually made, but to determine the general object of the negotiations, the particular sense in which the terms, otherwise uncertain of application, were used at the time, or the conditions as they existed at the time of the conclusion of the treaty. (Crandall on "Treaties, Their Making, etc.," sec. 166.)

The author there reviews a number of instances of the application of this rule, among others the case of *United States v. Texas* (163 U. S. 1, 23, 37), where the Supreme Court of the United States referred to the diplomatic correspondence that led to the treaty with Spain of February 22, 1819, "to show the circumstances under which the treaty of 1819 was made and to bring out distinctly two facts"—(1) that the negotiators had access to the map of Melish, improved to 1818, and published at Philadelphia (expressly referred to in the treaty), and (2) that the river referred to in the correspondence as Red River was believed by the negotiators to have had its source near Santa Fé and the Snow Mountains.

Again, in the Alaskan boundary tribunal Lord Chief Justice Alverstone, writing an opinion in support of the decision of a majority of the members of the tribunal for the purpose of giving construction to the meaning of the words employed in the treaty, referred to the meanings given to those words by the negotiators in their written communications during the course of the negotiations.

In the case of the proceedings before the mixed commission constituted under the Jay treaty with Great Britain to determine the St. Croix River and its sources as described in the treaty a letter written by Franklin was considered for the purpose of establishing a map used by the negotiators, as there appeared to be no river in the region under consideration known by the name used in the treaty.

So an explanatory note filed by the Russian Minister as to the interpretation placed by his government on the treaty of 1824 between the United States and Russia was at a later period used by the United States, who had succeeded Russia in all her rights to Alaska, in support of her contention in the Bering Sea controversy with Great Britain. (Crandall, p. 382.)

One of the most striking instances of the use of these contemporary memoranda is given by Crandall in the case of the treaty between the United States and Great Britain of April 19, 1850, where, after the adoption by the United States Senate of the resolution advising ratification, memoranda were filed by the negotiators in which it was stated that the language of Article 1—that neither party would ever “occupy, or fortify, or colonize, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America”—was not understood by the contracting states, nor by themselves, to include the British settlement at Honduras and adjacent islands.

Although the declaration of the American negotiator was given with the approval of the chairman of the Senate Committee on Foreign Relations, who professed to speak as to the understanding of the Senate—an assumption denied and much criticized later by different members—it formed no part of the treaty, not having been mutually agreed to by the treaty-making authorities of the two states. A main purpose of the treaty had been to do away with British pretensions in Central America, not to confirm them, and any exception to this general purpose and to the wording of the treaty should have been expressly stated. Whether Belize was or was not excepted from the operation of the treaty depended solely upon the geographical fact of its location without or within the boundaries of Central America as then known. But if this fact was not clearly ascertainable the memoranda, as expressions of those intimately connected with the formation of the article, could not be overlooked. (Crandall, p. 381.)

At the conclusion of the convention at the First International Peace Conference, held at The Hague on July 29, 1899 (2 Malloy, 2016-2032), the plenipotentiaries of the United States signed the Convention for the Pacific Settlement of International Disputes under reservation of the following declaration:

Nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of

policy or internal administration of any foreign state; nor shall anything contained in the said convention be construed to imply a relinquishment by the United States of America of its traditional attitude toward purely American questions.

It appears that the American delegates first declared this reservation on July 25, 1899, which was repeated when their signatures were placed on the convention as stated above. This action was reported to the President by the Secretary of State on December 19, 1899, when the conventions were forwarded without comment or recommendation to the President for submission to the Senate. This convention was duly ratified by the Government of the United States, by and with the advice and consent of the Senate, on February 5, 1900, the resolution being incorporated in the act of ratification deposited at The Hague, but there is no record of any comment from other Powers, although, of course, the other Powers ratified the treaty or accepted it with the reservations placed upon it. The Senate resolution of ratification, however, did not include a declaration of the reservation above referred to, which was enunciated by the plenipotentiaries at the time of signing the convention and by the President in his proclamation dated November 1, 1901.

The reservation incorporated in the resolution of ratification by the Senate of the Convention for the Pacific Settlement of International Disputes concluded in the Second International Peace Conference held at The Hague in 1907 is identical with the reservation to the convention declared by the United States delegates at the First International Peace Conference signed on July 29, 1899.

Again, in ratifying the convention and protocol signed April 2, 1906, after the Algeiras Conference, which regulated in the interest of the Powers commercial intercourse with northern Africa, the Senate resolved:

That the Senate, as a part of this act of ratification, understands that the participation of the United States in the Algeiras Conference and in the formation and adoption of the General Act and Protocol which resulted therefrom was with the sole purpose of preserving and increasing its commerce in Morocco, the preservation of the life, liberty, or property of its citizens residing or traveling therein, and of aiding by its friendly offices and efforts in removing friction and controversy which seem to menace the peace between the Powers signatory with the United States to the treaty of 1880 and without purpose to depart from the traditional American foreign policy which forbids participation by the

United States in the settlement of political questions which are entirely European in their scope.

In February, 1913, the Senate ratified the International Sanitary Convention signed at Paris, January 17, 1913, modifying the International Sanitary Convention of December 3, 1903, with the proviso:

That the Senate advise and consent to the ratification of said convention with the understanding, to be expressed as a part of the instrument of ratification, that nothing contained in Article 9 thereof shall be deemed to prevent the United States from carrying out any special quarantine measures against the infection of its ports which might be demanded by unusual sanitary conditions.

It does not appear that the treaty was referred back to the other Powers for approval of this proviso, nor that such action was required, as there appears to be nothing in the ninth article which would prevent the United States from carrying out such special quarantine measures in the case referred to.

On the other hand, the Senate, in ratifying the proposed arbitration convention negotiated by Secretary Knox under date of August 3, 1911, adopted as a part of the resolution of ratification a proviso—

That the Senate advise and consent to the ratification of said treaty, with the understanding, to be made part of such ratification, that the treaty does not authorize the submission to arbitration of any question which affects the admission of aliens into the United States or the admission of aliens to the educational institutions of the several States, or the territorial integrity of the several States or of the United States, or concerning the question of the alleged indebtedness or moneyed obligations of any State of the United States, or any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions commonly described as the Monroe Doctrine, or other purely government policy.

President Taft, considering this proviso to be at variance with the provisions of the treaty and as constituting in effect an amendment to it, withdrew the treaty from further consideration, and no further action was taken upon it.

It would seem, therefore, perfectly clear that a resolution of the Senate interpreting the treaty and clearly reserving American rights can be made without destroying the binding effect of the ratification.

## CHRONICLE OF INTERNATIONAL EVENTS

### WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, *Annales des sciences politiques*, Paris; *Arch. dipl.*, *Archives Diplomatiques*, Paris; *B.*, *boletin*, *bulletin*, *bolletino*; *P. A. U.*, *bulletin of the Pan-American Union*, Washington; *Cd.*, *Great Britain, Parliamentary Papers*; *Clunet*, *J. de Dr. Int. Privé*, Paris; *Current History*—*Current History—A Monthly Magazine of the New York Times*; *Doc. dipl.*, *France, Documents diplomatiques*; *B. Rel. Ext.*, *Boletin de Relaciones Exteriores*; *Dr.*, *droit*, *diritto*, *derecho*; *D. O.*, *Diario Oficial*; *For. rel.*, *Foreign Relations of the United States*; *Ga.*, *gazette*, *gaceta*, *gazzetta*; *Int.*, *international*, *internacional*, *internazionale*; *J.*, *journal*; *J. O.*, *Journal Officiel*, Paris; *L.*, *Law*; *M.*, *Magazine*; *Mém. dipl.*, *Mémorial diplomatique*, Paris; *Monit.*, *Belgium, Moniteur belge*; *Martens*, *Nouveau recueil général de traités*, Leipzig; *Official Bulletin*, *Official Bulletin of the United States*; *Q.*, *Quarterly*; *Q. dip.*, *Questions diplomatiques et coloniales*; *R.*, *review*, *revista*, *revue*, *rivista*; *Reichs G.*, *Reichs-Gesetzblatt*, Berlin; *Staats*, *Staatsblad*, Netherlands; *State Papers*, *British and Foreign State Papers*, London; *Stat. at L.*, *United States Statutes at Large*; *Times*, *The Times* (London).

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- 30 RUSSIA. All Russian government under Admiral Kolchak announced ministry. Personnel: *Current History*, 10 (Pt. 1): 485.

#### *February, 1919.*

- 8 PANAMA—UNITED STATES. Commercial Travelers Convention signed. *Congressional Record*, June 4, 1919; *P. A. U.*, 49: 99.

#### *March, 1919.*

- 1 KOREA. Declaration of independence made. A constitution was proclaimed on April 27th. Texts: *Current History*, 10 (Pt. 2): 132.
- 7 PHILIPPINES. Philippine legislature passed a Declaration of purposes. Text: *Current History*, 10 (Pt. 2): 129.
- 15 AUSTRIA. Personnel of cabinet announced with Dr. Karl Renner as Chancellor. *Current History*, 10 (Pt. 1): 470.



- 28 • CHILE—GREAT BRITAIN. A referendum treaty signed for establishment of a peace commission. Summary of text: *P. A. U.*, 48: 716.

*April, 1919.*

- 1 ITALY. Announced that Italy had raised Adriatic blockade. *London Times*, April 1, 1919.
- 1 BLOCKADE. Announced blockade would be raised as regards Poland, Esthonia, German-Austria, Turkey, Bulgaria, Czecho-Slovakia and new territories of Roumania and Serbia. *London Times*, April 1, 1919; *London Gazette*, April 4, 1919.
- 4 LITHUANIA. Republic formally declared and A. Smatma elected president. *Current History*, 10 (Pt. 2): 494.
- 8 FRANCE—SWITZERLAND. New economic convention with France ratified by Swiss Federal Council. *London Times*, April 11, 1919; *Le Temps*, April 10, 1919.
- 9 SPAIN—GREAT BRITAIN. Announced that a new commercial arrangement is about to be signed. *London Times*, April 9, 1919.
- 11 PEACE CONFERENCE. International labor program presented. Text: *Current History*, 10 (Pt. 1): 516.
- 11 CROATIA. Asks independence and protests against union with Serbia. *Washington Post*, April 11, 1919.
- 15 POLAND. Hugh Gibson appointed American minister to Poland. *New York Times*, April 16, 1919.
- 17 CZECHO-SLOVAKIA. Richard Crane appointed American Minister to Czecho-Slovakia. *New York Times*, April 17, 1919.
- 17 SWITZERLAND—GERMANY. Swiss Federal Council announces that the German Government will be recognized. *London Times*, April 19, 1919.
- 17 ALBANIA. Albania asked Peace Conference for full independence. *New York Herald*, April 17, 1919.
- 18 GREECE—JUGOSLAVIA. Announced that treaty of alliance had been concluded. *Current History*, 10 (Pt. 1): 428.
- 19 GERMANY—JAPAN. Publication of text of alleged treaty. *New York Times*, April 19, 1919.
- 20 CZECHO-SLOVAKIA—POLAND. Reported a secret treaty has been signed. *New York Herald*, April 20, 1919.

- 21 GERMANY. Allied conditions respecting Peace Conference\* accepted by Germany. Personnel of German delegation. *Current History*, 10 (Pt. 1): 382.
- 21 EX-KAISER WILHELM. Belgian delegation to the Peace Conference announced that Belgium would refuse to prosecute Kaiser Wilhelm, on the ground (1) that there is no tribunal competent to hear the charges against the Kaiser,\* (2) no provision in international law covering such cases, (3) that such action taken would be retroactive, (4) persons guilty of acts punishable under criminal codes in any of belligerents should be tried in the ordinary way. *Current History*, 10 (Pt. 1): 420; *New York Times*, April 17, 1919.
- 21 Walloons of Prussia. Ask to be disannexed from Prussia. *New York Times*, April 22, 1919.

*April 22-August 27.*

ROUMANIA—HUNGARY. On April 22 Hungary declared a war of defense against Roumania. On April 25th, Hungary asked an armistice, but refused terms offered on May 8th. Negotiations for armistice continued and a truce was established on May 10th. *New York Times*, April 22, May 2, 3, 9, 1919; *Current History*, 10 (Pt. 1): 433. Fighting continued, and on August 4th, Roumanian troops occupied Budapest. *London Times*, August 7, 1919. On August 7th, the United States sent ultimatum to Roumania demanding withdrawal of severe armistice terms on pain of cessation of shipment of food to Roumania. *Washington Post*, August 8, 1919. Between August 6th and August 31st notes were exchanged between the Peace Conference and Roumania, the latter still occupying Hungary. Texts of notes exchanged: *London Times*, August 11, 15, 16, 28, 1919; *Washington Post*, August 15, 1919; *Current History*, 10 (Pt. 2): 480; *Review of Reviews*, 60:379.

- 22 EGYPT. United States recognized British protectorate. *Current History*, 10 (Pt. 1): 427; *New York Times*, April 26, 1919; *London Times*, April 25, 1919.
- 28 LEAGUE OF NATIONS. Created by the adoption of the revised Covenant at the Fifth Plenary Session of the Peace Conference. Text: *London Times*, April 29, 1919; Supplement

- to this JOURNAL, April, 1919, p. 128. On May 5th provisional organization of League of Nations was announced. Stéphen Pichon, Foreign Minister of France, presided as chairman, and Sir Eric Drummond assumed duties as Secretary General. *London Times*, May 7, 1919. On July 5th the Senate of Argentine Republic ratified the League of Nations, *La Prensa*, July 5, 1919. On August 5th, Senate of Chile approved entrance of Chile into League of Nations. *Washington Post*, August 6, 1919. On August 17th, King of Spain signed law authorizing Spain to adhere to League Covenant. *New York Sun*, August 18, 1919. On July 11th it was announced that unless Switzerland adhered to the League within two months the seat of the League would be moved from Geneva. *New York Times*, July 12, 1919.
- 22 Supreme Economic Council ends blacklisting and trade licensing. *Washington Post*, April 23, 1919.
- 23 MEXICO—FRANCE. Mexican Minister to France recalled. *New York Times*, April 24, 1919.

*April 14—June 6.*

- Fiume. President Wilson issued memorandum on Fiume April 14th and a statement on April 23d. Reply of Premier Orlando, statement of Serbia to Great Britain and résumé of Italian claims. *Current History*, 10 (Pt. 1): 405–415. Italian Premier announced that the Italian delegation would leave Paris April 24th. *Washington Post*, April 24, 1919. On May 4th the delegation was invited to return to conference. *New York Times*, May 5, 1919. On June 6th the city of Fiume sent protest to United States Senate accusing President Wilson of hostility. Text: *New York Times*, June 7, 1919.
- 23 Committee on Responsibility for War published report. Among others, ex-Kaiser, ex-King of Bulgaria, Admiral von Tirpitz, and General von Bissing are found subject to trial. *New York Sun*, April 25, 1919; *Le Temps*, April 24, 1919; *London Times*, April 24, 1919.
  - 25 ITALY—JUGOSLAVIA. Italy refuses to keep agreement made in 1918, which had been accepted by United States. Text: *Washington Post*, April 26, 1919.

- 26 CHINA. Concessions to Germans in Hu-Kuang cancelled. *New York Sun*, April 27, 1919.
- 28 SWITZERLAND—CZECHO-SLOVAKIA. Announced that Switzerland had recognized Czecho-Slovakia, subject to eventual delimitation of its frontiers. *London Times*, April 28, 1919.
- 28 BLOCKADE. Germany was notified of raising of blockade. *New York Times*, April 29, 1919.
- 30 JAPAN—CHINA. Council of Three announced agreement by which Shantung Peninsula and Kiao-Chau were transferred to Japan, to be eventually returned to China. *London Times*, May 1, 1919; *New York Times*, May 1, 1919. On May 1st both Houses of Chinese Parliament ask Peace Conference for restoration of Kiao-Chau restrictions. *New York Tribune*, May 2, 1919; *New York Times*, May 2, 1919. On May 4th Chinese delegates delivered protest to M. Clemenceau relative to Shantung. Text: *Current History*, 10 (Pt. 1):444; (Pt. 2):203. On July 16th Japan denied any agreement to return Shantung to China. *New York Times*, July 17, 1919; *Current History*, 10 (Pt. 2):539, 550.
- 30 AFGHANISTAN. The son of Siraj-ul-Millat-Waddin proclaimed Emir. *Current History*, 10 (Pt. 1):424.
- 30 BAVARIA. Soviet government at Munich overthrown. *Washington Post*, May 1, 1919.

*May, 1919.*

- 1 HUNGARY. Czecho-Slovakia, Jugoslavia, and Roumania recognized Bela Kun. Text of notes: *London Times*, May 3, 1919.
- 2 HUNGARY. Provisional anti-bolshevist government formed under Count Julius Karolyi with headquarters first at Arad and later at Szegedin. *Current History*, 10 (Pt. 2):79.
- 2 SPAIN. Señor Maura appointed Prime Minister. Personnel of cabinet: *Current History*, 10 (Pt. 1):433.
- 2-18 RUSSIA—ROUMANIA. Russian Soviet Government sent from Moscow an ultimatum to Roumania, demanding evacuation of Bessarabia, occupied since the signing of armistice. *Current History*, 10 (Pt. 1):433; *London Times*, May 3, 1919. On May 18th, the Russian Soviet Government at Moscow declared a state of war to exist between Red Russia and Roumania.

- owing to the latter's continued occupation of Bessarabia. *Current History*, 10 (Pt. 2): 87. On July 23d Bolshevist Russia offered peace to Roumania. *New York Times*, July 24, 1919.
- 3 RUSSIA—UKRAINIA. Lenine announced alliance between Russian and Ukranian Reds against Roumania. *New York Times*, May 4, 1919.
- 5 GERMANY. Von Jagow, former Foreign Minister, admitted that Germany manufactured a pretext for the war. Text: *New York Times*, May 6, 1919.
- 5 BELGIUM. Premier Delacroix, of Belgium, issued statement as to Belgian indemnity. Text: *Current History*, 10 (Pt. 1): 424.
- 6 FINLAND. On July 20, 1917, the Finnish Diet declared its independence of Russia, to which the Grand Duchy of Finland was ceded by the Treaty of Fredrikshamn, Sept. 17, 1809. *London Times*, May 7, 1919; *Current History*, 10 (Pt. 1): 473. Finland was recognized by Great Britain on May 6th, by the United States on May 7th, *London Times*, May 13, 1919; by China, Aug. 13th, *London Times*, Aug. 14th; by Italy, June 28th, *London Times*, June 28, 1919. On May 11th, Prince Ivoft, chairman of Russian commission in Paris, protested against the Entente Powers' unconditional recognition of Finland's independence. *London Times*, May 12, 1919. On June 21st the Finnish Diet adopted a new constitution. *London Times*, June 24, 1919. On July 25th, Professor Karl Stahlberg was elected president of Finland. Professor Stahlberg is fifty-four years old, and was formerly professor of law in the University of Helsingfors. He was Minister of Commerce in 1905, and afterward served as Prime Minister, and later as president of the Supreme Court. *London Times*, July 28, 1919.
- 6 GERMAN COLONIES. Mandatory Powers announced for German colonies. *Current History*, 10 (Pt. 1): 449.

*May 7-June 28.*

GERMANY. Draft of treaty of peace delivered to the German delegates at Versailles. *Current History*, 10 (Pt. 1): 381; *London Times*, May 8, 1919. On May 9th President Ebert published treaty. Text: *Current History*, 10 (Pt. 1): 399. Text of Allied and German notes exchanged May 10th-June 16th.

London *Times*, May 12, 15, 24, 26, June 17, 1919; *Current History*, 10 (Pt. 2): 1, 191. On May 24th the Allied and Associated Powers addressed notes to contiguous neutrals asking them if they would agree not to trade with Germany in case that country refused to sign Peace Treaty. New York *Sun*, May 25, 1919. On June 17th the completed treaty was given to Germany. London *Times*, June 20, 1919; notes were exchanged June 17th. Texts: London *Times*, June 19, 24, 1919. On June 23rd notes were exchanged relative to German reservations. New York *Times*, June 23, 1919. On June 23d German National Assembly voted, 237 to 138, to sign treaty unconditionally. New York *Times*, June 23, 24, 1919. Final exchange of notes, June 23rd, London *Times*, June 24, 1919. On June 28th, at 4 P.M., at Versailles, signatures were formally attached to (1) Peace treaty, (2) protocol relative to changes, and (3) protocol relative to Rhine agreement. Texts: *Current History*, 10 (Pt. 2): 196, 285; London *Times*, June 28, July 4, 1919. See also June 28, 1919.

- 7 COSTA RICA. Revolutionists issue proclamation naming Julian Acosta provisional president and asking recognition by Central American Republics. New York *Times*, May 8, 1919.
- 8 RUSSIA. Department of State announced that the Archangel Provisional Government has recognized the Omsk Government as the Provisional National Government of all Russia. New York *Times*, May 9, 1919.
- 11 VORALBERG. By plebiscite 45,500 Voralbergers voted to join Switzerland and 11,000 registered against the proposal, which has now been referred by the Swiss Federal Council to a plebiscitum of the Swiss cantons interested. Voralberg has 1,004 square miles of territory. London *Times*, May 13, 1919.
- 11 ABYSSINIA. Abyssinia asked Peace Conference to name a protecting Power for her. New York *Times*, May 12, 1919.
- 12 UNITED STATES—CHILE. Parcel post convention signed. Washington *Post*, May 13, 1919.
- 12 CHINA. Agreement to aid China signed in Paris by Allied bankers. Text: New York *Times*, August 1, 1919.
- 12 DENMARK. Danish Parliament adopted a resolution relative to Schleswig. Text: *Current History* 10 (Pt. 1): 427.
- 13 POLAND. Premier Paderewski resigned, owing to refusal of

- Polish Diet to support his promise to Peace Conference not to proceed against the Ukrainians in East Galicia. Resignation not accepted. *Current History*, 10 (Pt. 2) : 80.
- 13-26 POLAND-UKRAINIA. Poland waged campaign against Ukrainians in East Galicia. On May 19th the Ukrainians requested an armistice, which was granted and negotiations transferred to Warsaw. On May 26th Polish Diet announced principle of autonomy would be adopted for captured region. *Current History* 10 (Pt. 2) : 82.
- 14 GERMANY. Blockade further relaxed by the Supreme Council. Text: *London Times*, May 15, 1919.
- 14 SMYRNA. Greek forces landed to administer the government in accordance with mandate received from the Allied and Associated Powers. *Current History*, 10 (Pt. 1) : 429; *London Times*, May 16, 1919; *New York Sun*, May 30, 1919.
- 18 PERSIA. Through Mr. Tagizadeh, a member of the Persian Parliament, a memorandum was addressed to the Peace Conference. Summary: *Current History*, 10 (Pt. 2) : 74.
- 21 EGYPT. New cabinet formed with Mahomed Said Pasha as Prime Minister. Personnel: *Current History*, 10 (Pt. 2) : 71.
- 22 ITALY. United States, Great Britain and France send note to Italy requesting explanation of landing of Italian forces in Turkey. *New York Times*, May 23, 1919.
- 23 NEWFOUNDLAND. Former Finance Minister, M. P. Cashin, formed new ministry. Personnel: *Current History*, 10 (Pt. 2) : 74.
- 24 AUSTRIA. President Seitz issued statement on peace terms. Text: *Current History*, 10 (Pt. 2) : 49.

May 25-July 24.

AALAND ISLANDS. Swedish delegates handed note to Peace Conference relative to Swedish claim to the islands, asking plebiscite. Text: *Current History*, 10 (Pt. 2) : 75. On June 3d the Landsting of Aaland Islands sent to President Wilson and Peace Conference a resolution demanding reunion with Sweden. *New York Sun*, June 4, 1919. On June 20th Sweden, in reply to a note from Finnish Government, repeated its proposal that a plebiscite be held in Aaland Islands, in accordance with principle of self-determination. *London Times*, June 23, 1919. On July 24th report of Baltic Commission was pre-

sented to the Peace Conference. The commission recommended that the islands should be neutralized under the guarantee of the League of Nations. *London Times*, July 25, 1919.

*May 26-June 12.*

- All Russian Government at Omsk. Exchange of notes between Council of Four and Admiral Kolchak, which resulted in an offer of assistance in food, supplies, and munitions. Texts: *Current History*, 10 (Pt. 2): 90; *London Times*, May 27, 1919.
- 27 DANZIG. By order of the Peace Conference, the city was occupied by British and American marines. *Current History*, 10 (Pt. 2): 80.
- 27 UNITED STATES—FINLAND. Thornwell Hays appointed Commissioner to Finland with rank of Minister Plenipotentiary. *Washington Post*, May 28, 1919.
- 27 RHENISH PRUSSIA. Petitioned Peace Conference to be separated from Prussia. *Washington Post*, May 28, 1919.
- 27 RUSSIA. The Council of Four and Japan inform Admiral Kolchak he must recognize independence of Poland and Finland. *New York Times*, May 28, 1919. On June 5th, Kolchak replied. Text: *London Times*, June 9, 1919.

*May 28-August 26.*

MEXICO—UNITED STATES. The United States sent note to Mexico demanding protection for Americans in Chihuahua from Villa. *New York Times*, June 19, 1919. On May 29th Mexico requested permission for Mexican troops to cross border in pursuit of bandits. Permission refused. *New York Tribune*, May 30, 1919. On June 14th American troops crossed Mexican border and lifted the siege of Juarez, where Mexican federal troops had been besieged. The rebels were scattered. The Mexican Government, on June 17th, protested against this "violation of Mexican sovereignty." *Current History*, 10 (Pt. 2): 73. On June 15th a further note on loss of American life and property was sent to Mexico. *New York Sun*, May 16, 1919. On June 19th Mexico also accepted explanation of crossing of American troops, and promised to guard border and end rebel warfare there. *New York Times*, June 19-20, 1919. On June 20th Mexico promised to punish bandits. *New*



York *Times*, July 21, 1919. On July 19th United States sent note to Mexico relative to recent attack on American sailors. New York *Times*, July 20, 1919. Mexican reply, New York *Times*, July 25, 1919. On August 14th President Wilson warned President Carranza that American lives and property must be protected. Text: New York *Times*, August 15, 1919. On August 18th the United States sent a punitive expedition to cross border and capture bandits. This expedition returned to American soil on August 26th. New York *Times*, August 20, 27, 1919. On August 21st Mexico protested against crossing of border by United States troops. New York *Times*, August 22, 1919.

- 28 ROUMANIA. Royal decree signed emancipating the Jews of Roumania. Text: *Current History*, 10 (Pt. 2): 243. London *Times*, June 3, 1919.
- 29 SWITZERLAND. Refused to join in blockade against Germany as being a violation of neutrality. New York *Times*, May 30, 1919.
- 29 GERMANY. North Sea fishing blockade partly relaxed by the Supreme Economic Council. London *Times*, April 30, 1919.
- 31 SCHLESWIG. Plebiscite held in Schleswig. Northern section favors Denmark, while middle sections favor Germany. Washington *Post*, June 1, 1919.

*June, 1919.*

- 1-8 RHINE REPUBLIC. On June 1st the Rhine Republic was proclaimed in various Rhine cities, and Dr. Dorton was installed as Provisional President at Wiesbaden. Herr von Winterstein was named President of Palatinate. On June 3d Dr. Dorton asked recognition of the Allies, and the same day Germany sent protest to the Peace Conference charging French influence. On June 4th Chancellor Scheideman began proceedings against President Dorton for treason, and France ordered obedience to President Dorton. On June 7th the officials were ejected from government buildings and republic came to an end. *Current History*, 10 (Pt. 2): 41; London *Times*, June 4, 5, 15; New York *Times*, June 4, 5; New York *Herald*, June 5, 1919.
- 2 NORWAY. Refused to join in blockade against Germany. New York *Times*, June 3, 1919.

- 2 COSTA RICA. Guatemala, Honduras and Nicaragua recognize belligerency of anti-Tinoco revolutionists. *New York Tribune*, June 3, 1919.
- 2 TRIPOLITANIA. King Victor Emmanuel signed decree giving natives a large share in administration of colony and wider rights of citizenship. *Current History*, 10 (Pt. 2): 235.
- 2-6 SECOND PAN-AMERICAN COMMERCIAL CONFERENCE. Held in Washington, *P. A. U.*, 49:1. July.

June 2-September 10.

- AUSTRIA. Incomplete copy of treaty was formally handed Austrian delegation, headed by Dr. Carl Renner, at St. Germain-en-Laye. Final text of treaty delivered to delegation on June 21st. Summary, *Current History*, 10 (Pt. 2): 48; text of speeches, *London Times*, June 3, 1919; *New York Times*, June 3, 1919. On September 6th, Austrian assembly voted to ratify treaty. Treaty signed at St. Germain, September 10, 1919. Text: *Current History*, 11 (Pt. 1): 21, 26, 1919.
- 3 GREAT BRITAIN—JUGOSLAVIA. Great Britain recognized Yugoslav Republic. *London Times*, June 3, 1919.
- 3 GREAT BRITAIN—KINGDOM OF SERBS, CROATS AND SLOVENES. Great Britain recognized kingdom of Serbs, Croats and Slovenes. *London Times*, June 3, 1919.
- 3 BRAZIL—VENEZUELA. Agreement signed concerning diplomatic mail pouches. *P. A. U.*, 49:99. July.
- 3 POLAND—SPAIN. Announced that Spain had recognized Poland. *London Times*, June 3, 1919.
- 3 POLAND. Department of State of the United States announced Polish Government has given assurances that Jews would be protected. *New York Times*, June 4, 1919.
- 4 UKRAINIA. Announced that the seat of government had been moved to Kamenetz-Podolsk. *London Times*, June 4, 1919.
- 4 COSTA RICA—UNITED STATES. American marines landed at Punta Arenas and Port Limon, Costa Rica. *New York Times*, June 5, 1919.
- 5 PORTUGAL. President Castro of Portugal presents his resignation to Congress, but upon request, withdraws it. *New York Times*, June 6, 1919.

- 5 POLAND—NORWAY. Norway recognized Poland. *London Times*, June 5, 1919.
- 6 AUSTRIA—JUGOSLAVIA. Armistice became effective at 7 p.m. *Current History*, 10 (Pt. 2); 50.
- 6 ROUMANIA—UKRAINIA. Ultimatum issued to Ukraina, announcing Roumanian occupation of Kolomea and Stanislau. *London Times*, June 6, 1919.
- 8 NICARAGUA—UNITED STATES. Nicaragua asks assistance from the United States to prevent invasion by Costa Rica. *New York Times*, June 9, 1919.
- 9 BELGIUM—GREAT BRITAIN. Agreement signed concerning graves of British soldiers. Ratified by Belgian Senate, August 13th. *London Times*, August 14, 1919.
- 9 LICHTENSTEIN. Principality of Lichtenstein asked recognition of Peace Conference. *New York Times*, June 10, 1919.
- 9 HUNGARY—CZECHO-SLOVAKIA. Peace Conference telegraphed Hungarian Government that attacks on Czecho-Slovak forces must cease. *Current History*, 10 (Pt. 2): 70. Reply of Bela Kun. Text: *London Times*, June 11, 18, 1919.
- 9 GREAT BRITAIN—URUGUAY. Arbitration treaty, ratified February 11, 1919, was proclaimed by Great Britain. *London Times*, June 9, 1919.
- 10 CHINA. President and cabinet resign. *London Times*, June 16, 1919.
- 10 GERMANY—ESTHONIA. Marshal Foch ordered Gen. von der Goetz to cease hostilities against Esthonians. *Current History*, 10 (Pt. 2): 86. On June 16th armistice went into effect. *London Times*, June 17, 1919. Germans renewed hostilities on June 21st. *London Times*, June 24, 1919.
- 10 FRANCE—SERBIA—CROATS—SLOVENES. France recognized Kingdom of Serbs, Croats, and Slovenes. *Le Temps*, June 11, 1919.
- 11 BELGIUM—HOLLAND. Statement made by M. Hymans, Belgian Foreign Minister, relative to negotiations between the two countries. *London Times*, June 12, 1919.
- 13 GERMANY. Eighth German Peace Conference met, being a general meeting of the German peace associations and of the Bureau of International Law. *London Times*, June 16, 1919.

- 14 RUSSIA—OLONIETS GOVERNMENT. Declaration of separation from Russia issued by Oloniets Government. *London Times*, June 19, 1919.
- 16 SPAIN—CZECHO-SLOVAKIA. Spain recognized the independence of Czecho-Slovakia. *London Times*, June 16, 1919.
- 17 HUNGARY. Bela Kun replies to Allies' second note. Text: *London Times*, June 18, 1919.

*June 17—July 4.*

- TURKEY. Turkish delegation to Peace Conference presented a plea to be heard on June 17th. After exchange of notes, the delegates were advised that nothing would be gained by a longer stay in Paris, and on July 4th the mission left for Constantinople. *Current History*, 10 (Pt. 2): 229.
- 17 UKRAINIA—ROUMANIA. Diplomatic relations broken off. *London Times*, June 18, 1919.
- 17 GREECE—GREAT BRITAIN. Greece denounced, as from March 3, 1919, the existing commercial agreements with Great Britain, but offered to renew them for successive periods of three months. The offer has been accepted. *London Times*, June 18, 1919. *London Gazette*, June 17, 1919.
- 20 CZECHO-SLOVAKIA. A Soviet Republic set up. *New York Times*, June 21, 1919.
- 20 ECUADOR—COLOMBIA. Boundary agreement signed. *New York Times*, July 21, 1919.
- 20 ITALY. Orlando cabinet resigned. *London Times*, June 21, 1919.
- 20-26 BRAZIL. Dr. Epitacio Pessoa, president-elect of Brazil, arrived in United States, remaining till June 26th. *New York Times*, June 20-26, 1919.
- 20 GERMANY. Cabinet resigned. New cabinet formed with Herr Bauer as Prime Minister, in place of Herr Scheidemann. *London Times*, June 21, 1919. Personnel: *London Times*, June 23, 1919.
- 24 MUGAN. A Soviet Republic proclaimed in Mugan Province, the southern part of the Baku Government. The republic is to become federated with the Russian Soviet Republic. *London Times*, June 24 1919.
- 24 BELGIUM. The Council of Four gave formal approval of the granting of priority to Belgium in the reparations to be paid

by the Germans to the amount of \$500,000,000. The Council ratified plan to wipe out Belgium's war debt by substituting German peace bonds for Belgian obligations, the four Great Powers taking over the bonds. This was to be subject to the approval of the Parliaments of the four Powers. The Peace Treaty requires Germany to reimburse Belgium for all money Belgium has been forced to borrow as the result of the violation of the Treaty of 1839. *Current History*, 10 (Pt. 2): 243. *London Times*, June 26, 1919.

- 25 GERMANY—POLAND. Warning issued to Germany by Peace Conference as to German opposition to establishment of Polish authority in territories granted Poland. Text: *London Times*, June 26, 1919.
- 21 RUSSIA. Japan refused to send troops to Kolchak unless Allies do the same. *New York Herald*, June 22, 1919.
- 21 GERMANY. Germans sunk their fleet at Scapa Flow. *London Times*, June 23, 1919.
- 25 GERMANY—SUPREME COUNCIL. Exchange of notes relative to sinking of German fleet at Scapa Flow and the burning of French flags in Berlin. *Current History*, 10 (Pt. 2): 225.
- 26 PORTUGAL. The Premier, Señor Domingos Pereira, and cabinet resigned. *London Times*, June 28, 1919. Personnel of new cabinet. *London Times*, June 30, 1919.
- 28 PEACE CONFERENCE. On fifth anniversary of assassination of Archduke Ferdinand, the signatures were formally attached to the Peace Treaty, Protocol covering changes, and Protocol relative to Rhine agreement, at Versailles. A single copy of treaty was signed, to be deposited in French Foreign Office, authenticated copies to be furnished other Powers. *Current History*, 10 (Pt. 2): 196; text, *London Times*, June 28, 1919; Supplement to this JOURNAL for July, 1919. On July 9th the German National Assembly at Weimar voted 208 to 115 to ratify treaty with protocol and Rhine agreement. President Ebert signed "Ebert, President of German Empire." *New York Times*, July 10, 1919; *London Times*, July 11, 1919. On July 31st royal assent was given to British act of ratification. On August 26th Belgium ratified the treaty. *London Times*, August 27, 1919. See also May 17-June 28.

- 28 FRANCE—GREAT BRITAIN—UNITED STATES. Treaties signed between the United States and France and Great Britain and France, by terms of which the two Powers will come immediately to the aid of France if any unprovoked act of aggression is made against her by Germany. The English treaty contains an additional provision that the treaty imposes no obligation on any of the dominions of the British Empire, unless and until it be approved by the Parliaments of each dominion interested. Text: *Current History*, 10 (Pt. 2): 273. Supplement to this JOURNAL, pp. 411, 414. On July 31st royal assent was given to ratification by Great Britain. *London Gazette*, August 1, 1919.
- 28 POLAND. Treaty with Poland signed by the United States, France, Great Britain, Italy, and Japan. Text: *Current History*, 10 (Pt. 2): 278. Supplement to this JOURNAL, p. 423.
- 30 BELGIUM—JUGOSLAVIA. Announced that Belgium has formally recognized Yugoslavia. *London Times*, June 30, 1919.
- 30 GERMANY—SWITZERLAND. Export agreement concluded (which expires November 1, 1919) relative to coal, potassium, etc., and dairy and other produce. *London Times*, June 18, 1919.

*July, 1919.*

- 1 RUSSIA—UNITED STATES. Soviet Government warned the United States that reprisals would be made in case of arrest and detention of Russians in the United States. *New York Times*, July 2, 1919.
- 1 BELGIUM—HOLLAND. Belgium asked Holland for a parley regarding frontiers. *New York Times*, July 2, 1919.
- 2 RHINE-HESSE, OBERHESSEN, the PALATINATE and HESSE-NASSAU. Republic declared under the leadership of Herr Ulrich, former Deputy for Darmstadt. *London Times*, July 3, 1919.
- 3 EX-KAISER WILHELM. Premier Lloyd George announced in House of Commons that the ex-kaiser would be tried in London before an international tribunal composed of five eminent jurists representing Great Britain, United States, France, Italy and Japan. *Current History*, 10 (Pt. 2): 222. Parliamentary Debates, *London Times*, July 4, 1919.

- 4-20 PERU. President Pardo ousted by Peruvian troops and Augusto B. Leguia proclaimed provisional president; inaugurated as president July 20, 1919. *New York Times*, 5, 6, 25, 1919; *Current History*, 10 (Pt. 2): 246; *P. A. U.*, 29:198.
- 5 TURKEY. Texts of secret treaties for dismemberment of Turkey published in *Le Temps*. The last of these were signed by France, Italy and Great Britain in 1917. *Current History*, 10 (Pt. 2): 247. *New York Times*, July 6, 1919.
- 5 BRAZIL—UNITED STATES. Trade arbitration pact signed. *New York Times*, July 6, 1919.
- 5 ABYSSINIA. Abyssinian mission arrives in United States. *Washington Post*, July 6, 1919.
- 8 AUSTRIA—SOVIET GOVERNMENT OF HUNGARY. Austria demanded recall of Hungarian Minister Czobel. *Current History*, 10 (Pt. 2): 229.
- 8 RUSSIA. Foreign legations seized. *London Times*, July 9, 1919.
- 8 POLAND—ARGENTINE REPUBLIC. Announced that Argentine Republic had recognized Republic of Poland. *London Times*, July 8, 1919.
- 9-13 HUNGARY. Council of Four sent ultimatum to Bela Kun demanding immediate cessation of hostilities against Czechs. *Current History*, 10 (Pt. 2): 272.
- 9 GERMANY. Peace treaty ratified by National Assembly at Weimar. Ratifications deposited at Paris, July 11, 1919. *Current History*, 10 (Pt. 2): 218.
- 10 NETHERLANDS OVERSEAS TRUST. Upon request of Interallied Committee at The Hague, the Netherlands Overseas Trust consented to end the agreement concluded with the Associated Powers in London in December, 1918. *London Times*, July 11, 1919.
- 10 KINGDOM OF SERBS—CROATS—SLOVENES—UNITED STATES. H. Percival Dodge appointed American Minister to Kingdom of Serbs—Croats—Slovenes. *New York Times*, July 11, 1919.
- 10 HOLLAND—ALLIES. Holland replies to note of Council of Five regarding reported escape of former German Crown Prince. *New York Times*, July 11, 1919.
- 10 GERMANY. Rhine area control agreement made public. Text: *London Times*, July 11, 1919; supplement to this JOURNAL, p. 404.

- 10 BRAZIL. Dr. Pessôa proclaimed president. *New York Times*, July 11, 1919.
- 10 JAPAN—GERMANY. Text of alleged agreement revealed. *New York World*, July 11, 1919. Department of State and Japanese Embassy deny knowledge of treaty. *New York Times*, July 12, 19, 1919.
- 14 COSTA RICA—NICARAGUA. Both countries decline mediation of Mexico. *New York Times*, July 17, 1919.
- 14 LUSITANIA. Judge Julius M. Mayer, sitting in Admiralty Branch of United States District Court, dismissed claims for damages amounting to \$25,000,000 and absolved the Cunard Company from liability for the sinking of the *Lusitania*, torpedoed by a German submarine May 7, 1915. The sinking was declared an illegal act on the part of the German Government. *Current History*, 10 (Pt. 2): 23c. *New York Times*, July 15, 1919. Text of decision of July 15, 1918, in this JOURNAL for October, 1918, p. 862.
- 15 INTERNATIONAL JOINT COMMISSION. Ex-Senator Clark of Wyoming appointed to succeed the late James A. Tawney. *Washington Star*, July 16, 1919.
- 15 GERMAN EAST AFRICA. Blockade raised. *London Times*, July 30, 1919; *London Gazette*, July 29, 1919.
- 16 HOLLAND—SWITZERLAND. Dutch admit Switzerland's claim as a riparian state to right of navigation of the river Rhine. *New York Tribune*, July 17, 1919.
- 16 BIRKENFELD. A republic was proclaimed at Birkenfeld, in area of occupation. *New York Times*, July 17, 1919.
- 17 UNITED STATES—FRANCE. Navigation treaty signed. *Washington Post*, July 18, 1919.
- 17 UNITED STATES—ITALY—SPAIN—NETHERLANDS. United States Senate advised ratification of arbitration treaties with Italy, Spain and Netherlands. *Congressional Record*, July 17, 1919.
- 18 RUSSIA. Publication of message from Secretary Polk to Col. E. M. House concerning Kolchak. Text: *New York Times*, July 19, 1919. Later stated to be a private message to Col. House from Arthur Bullard of Committee on Public Information. *New York Times*, July 20, 1919.



- 19 MEXICO—UNITED STATES. Announced that Mexico claims ban on arms has been lifted. On July 25th President Wilson issued proclamation, again placing an embargo on shipment of arms to Mexico. *New York Times*, July 26, 1919.
- 21-24 GREAT BRITAIN. House of Commons passed both Paris treaties without change. House of Lords ratified them on July 24th. *New York Sun*, July 23, 25, 1919; *London Times*, July 25, 1919.
- 23 INTERNATIONAL AIR NAVIGATION. Publication of full text of convention drafted at Paris issued for information of public. The convention has not yet been approved formally by the Supreme Council. *London Times*, July 23, 1919.
- 25 MEXICO—UNITED STATES. President Wilson by proclamation places ban on shipment of arms to Mexico. *New York Times*, July 26, 1919.
- 25 AUSTRIA. Herr Otto Bauer, Prime Minister, resigned. *London Times*, July 28, 1919.
- 26 UNITED STATES. Shipping Board announces that the United States has resumed trade with the world. *New York Herald*, July 27, 1919.
- 25 BULGARIA. Bulgarian delegation arrived in Paris. *Current History*, 10 (Pt. 2): 229.
- 29 UNITED STATES—COLOMBIA. United States Senate Foreign Relations Committee by unanimous vote reported the treaty with Colombia. It carries an indemnity of \$25,000,000, but no apology, and provides for recognition of Panama. *Current History*, 10 (Pt. 2): 417; *Congressional Record*, July 29. On August 7th the treaty recommitted to Foreign Relations Committee. *Congressional Record*, August 7, 1919.
- 31 GREAT BRITAIN. Royal assent given to Peace Treaty. *London Times*, August 1, 1919.
- July 31-August 13.*
- GERMANY. German Constitution adopted by the National Assembly at Weimar by 262 votes to 75. On August 13th constitution was promulgated. Herr Gustav Adolph Bauer was appointed Chancellor. The National Assembly will bear the title Reichstag and the Bundesrat will replace the States or Federal Committee. *London Times*, August 15, 1919. *London Times*, August 2, 1919, text: *Current History*, 11 (Pt. 1): 86.

August, 1919.

- 1 CHINA. House of Representatives passed a bill declaring China at peace with Germany. A motion was adopted proposing to send a telegram of thanks to the United States Senate for stand taken on the Shantung question. *London Times*, August 4, 1919.
- 1-22 HUNGARY. Government passed from control of Bela Kun to the Social Democrats. Bela Kun fled to Vienna where he was interned. Text of message to Peace Conference: *London Times*, August 4, 1919. On August 6th cabinet resigned and Archduke Joseph took over control with title of State Governor. *London Times*, August 8, 1919. On August 9th Archduke Joseph requested the recognition of the new government by the Peace Conference. Text: *London Times*, August 11, 1919. Personnel of new cabinet under Archduke Joseph: *London Times*, August 18, 1919. On August 22d Supreme Council sent note to Interallied Mission in Budapest refusing to recognize Archduke Joseph as head of Hungarian Government, whereupon Archduke and cabinet resigned. Text: *London Times*, August 25, 1919.
- 2 COSTA RICA. United States Senate adopted resolution (S. Res. 105) asking President Wilson whether Nicaragua has been permitted to invade Costa Rica and why Costa Rica was not allowed to sign Peace Treaty. Secretary Lansing explained to the Senate why Tinoco was ignored. *Congressional Record*, August 2, 1919.
- 2 MEXICO—UNITED STATES. Protest sent to Mexico relative to cancellation of concessions. *New York Times*, August 3, 1919.
- 6 GERMANY—DENMARK. Denmark formally recognized Ebert Government. *London Times*, August 7, 1919.
- 6 INTERNATIONAL LABOR CONFERENCE. United States Senate passed a resolution authorizing President to call a general International Labor Conference. *Congressional Record*, August 6, 1919.
- 6 PORTUGAL. Senhor Antonio Jose de Almeida was elected president of Portugal. *London Times*, August 8, 1919.
- 6 CHINA—JAPAN. President Wilson issued statement regarding Viscount Uchida's reference to agreement of 1915 between China and Japan. Text: *New York Times*, August 7, 1919.

- 8 TURKEY—GREECE. Turks have proclaimed "holy war" against Greeks landed at Panderma. *New York Times*, August 9, 1919.
- 8 SPAIN—KINGDOM OF SERBS, CROATS AND SLOVENES. Spain formally recognized Kingdom of Serbs, Croats and Slovenes. *London Times*, August 11, 1919.
- 8 GERMANY—UNITED STATES. Announced that German potash may now be imported into the United States. *London Times*, August 8, 1919.
- 8 INDIA—AFGHANISTAN. Peace signed at 11 a.m. This war began May 2d, when Afghan troops crossed the Indian border near Kuyber. *London Times*, August 9, 1919.
- 9 GREAT BRITAIN—PERSIA. Two treaties signed—one political, the other defining the terms of a loan to be made to Persia by Great Britain. Texts: *London Times*, August 16, 1919. See editorial in this JOURNAL, p. 749.
- 11 GERMANY—POLAND. Negotiations begun in Berlin between representatives of the German and Polish Governments with regard to transfer from Germany to Poland of territories specified in Peace Treaty. *London Times*, August 13, 1919.
- 11 JAPAN—GREAT BRITAIN. Secretary Lansing announced that at the time of the Sino-American negotiations, Viscount Ishii concealed British-Japanese pact. *New York Times*, August 12, 1919.
- 12 AUSTRIAN REPUBLIC. Announced that the Inter-Allied Supreme Council had decided to recognize the new Austria as the "Austrian Republic." *London Times*, August 13, 1919.
- 13 UNITED STATES—GREAT BRITAIN. Viscount Grey of Fallodon appointed special Ambassador to the United States. *London Times*, August 14, 1919.
- 13 COSTA RICA. President Tinoco fled from Costa Rica. Juan Bautiste Quiros seized government. *New York Times*, August 14, 1919; *London Times*, August 15, 1919. On August 20th Costa Rica was informed that United States would recognize no government unless elected by people under the Costa Rican constitution. *Washington Post*, August 21, 1919.
- 13 RUSSIA. Announced that United States will send arms to Kolchak. *New York Times*, August 14, 1919.
- 14 UKRAINIA—POLAND. Note presented to British Foreign Office by Ukrainian Mission protesting against outrages alleged to

have been committed by Poles in Galicia, Kholon district and Volhynia, and asking that a commission of inquiry be appointed. *London Times*, August 14, 1919.

- 15 FINLAND—ESTHONIA. Announced Finland has recognized the independence of Esthonia. *London Times*, August 15, 1919.
- 15 JAPAN—RUSSIA. Announced that Japan will inform Admiral Kolchak that she is unable to accede to his request to send several divisions against the Bolsheviks. *London Times*, August 16, 1919.
- 16 Death of Dr. Thomas Joseph Lawrence, an eminent authority on international law. Dr. Lawrence was born April 23, 1849, was educated at Cambridge and was the first Whewell scholar to be appointed. He was ordained a priest of the Anglican Church in 1874. His *Principles of International Law* passed through six editions and his *Handbook of Public International Law* through ten. Among his other books may be mentioned *Essays on Some Disputed Questions in International Law*, *War and Neutrality in the Far East*, and *Documents Illustrative of International Law*. He was a member of the *Institut de Droit International*, and was professor of international law at the University of Cambridge 1883-85, and at the University of Chicago 1892-93. *London Times*, August 18, 1919.
- 16 KINGDOM OF SERBS, CROATS, SLOVENES. New cabinet announced. Personnel: *London Times*, August 18, 1919.
- 17 GREAT BRITAIN—MEXICO. Announced that Mexico had ordered Mr. H. A. Cummins, British chargé, to leave Mexico. *London Times*, August 18, 1919.
- 19 UNITED STATES—FRANCE. Senate Judiciary Committee holds treaty with France not in violation of Constitution. *New York Times*, August 20, 1919.
- 21 GERMANY—POLAND. Resolution adopted by conference between two governments. Text: *London Times*, August 22, 1919.
- 21 BULGARIA. Peace Treaty signed at Quai d'Orsay. *New York Times*, September 20, 1919.
- 21 FINLAND—UNITED STATES. A. H. Saastamoingen, first Minister from Finland to United States, presents credentials. *New York Times*, August 22, 1919.

- 21 UKRAINIA—ROUMANIA. Agreements signed allowing Ukraina to transport munitions across Roumania. *New York Herald*, August 22, 1919.
- 22 GERMANY. Friedrich Ebert took oath of office as Imperial President. *New York Times*, August 23, 1919.
- 23 UNITED STATES—CANADA. Treaty signed providing for protection of fish in the Pacific coastal and boundary waters. *London Times*, August 25, 1919.
- 26 BELGIUM. The Belgium Senate voted unanimously in favor of ratifying the Peace Treaty. *London Times*, August 27, 1919.
- 27 GREAT BRITAIN—BELGIUM. Announced that Great Britain had transferred to Belgium the administration of Ruanda and Urundi in German East Africa. The League of Nations gives this mandatory to Great Britain. *London Times*, August 29, 1919.
- 28 UNITED STATES—CHINA. Paul Reinsch, American Minister to China, resigned. *New York Times*, August 29, 1919.
- 28 HOLLAND — CZECHO-SLOVAKIA. Announced that Holland had recognized Czecho-Slovakia. *London Times*, August 28, 1919.
- 28 TURKEY. Admiral Bristol was appointed High Commissioner to Constantinople. *New York Times*, August 29, 1919.
- 29 PERU—UNITED STATES. The Leguia government of Peru recognized by the United States as the *de facto government*. *Washington Post*, August 30, 1919.
- 30 POLAND—UKRAINIA. Announced that agreement as to boundaries had been signed. *New York Sun*, August 31, 1919.

KATHRYN SELLERS.

## PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

### GREAT BRITAIN <sup>1</sup>

Afghanistan. Papers regarding hostilities with, 1919. (Cd. 324.) 1s. 1½d.

Aliens. Draft of an Order in Council to regulate the admission of aliens to the United Kingdom and the supervision of aliens in the United Kingdom after the war. (Cd. 172.) 3d.

Aliens' Restriction Order. Order in Council further amending, May 30, 1919. (St. R. & O. 1919, No. 663.) 1s. 1½d.

———. July 11, 1919. (St. R. & O. 1919, No. 861.) 11½d.

Anti-Dumping Legislation. Summary statement of the legislative provisions for the prevention of dumping in force in the Dominion of Canada, the Commonwealth of Australia, the Union of South Africa, and in the United States of America. (Cd. 265.) 2d.

Arbitration Agreements between the United Kingdom and France, Italy, Spain, and the United States, Renewal of. (Treaty Series, 1919, No. 2.) 1s. 1½d.

Arbitration Treaty between the United Kingdom and Uruguay, signed April 18, 1918. (Treaty Series, 1919, No. 3.) 1s. 1½d.

Armistices concluded between the Allied Governments and the Governments of Germany, Austria-Hungary and Turkey. (Cd. 53.) 3d.

Blockade of Germany, Conditions under which trading is permissible since the. (Cd. 274.) 1s. 1½d.

Bolshevism in Russia. A collection of reports on. (Russia No. 1, 1919.) 1s. Abridged edition. *Foreign Office*. 8d.

British Mission to South America, 1918. Correspondence respecting the. (Miscellaneous No. 2, 1919.) 4s. 1½d.

France, Treaty respecting Assistance to, in the event of unprovoked Aggression by Germany. Signed at Versailles, June 28, 1919. (Treaty Series, 1919, No. 6.) 2d.

<sup>1</sup> Parliamentary and Official Publications of Great Britain may be obtained for the amount noted, from the Superintendent of Publications, H. M. Stationery Office, Imperial House, Kingsway, London, W. C. 2.

FRANCE. Act of Parliament relating to. 9 and 10 Geo. V., Ch. 34.  
 Germany, Economic Conditions prevailing in, December, 1918, to March, 1919. Reports by British army officers. With appendices. (Cd. 52.) 1s.

———. Further reports, April, 1919. (Cd. 54.) 4d.

League of Nations, Covenant of the, with a commentary thereon. (Miscellaneous No. 3, 1919.) 3d.

Legal Procedure. Report of committee appointed to consider the conduct of legal proceedings between parties in the United Kingdom and parties abroad, and the enforcement of judgments and awards. (Cd. 251.) 4d.

Naturalization. Return showing the particulars of all aliens to whom certificates of naturalization have been issued and whose oaths of allegiance have, during 1918, been registered at the Home Office; including information as to any aliens who have, during the same period, obtained acts of naturalization from the legislature, and particulars of cases in which certificates of naturalization have been revoked within the same period. With summary. (H. C. Repts. and Papers, 1919, No. 74.) 4s. 1½d.

Peace Proposals made by His Holiness the Pope to the belligerent Powers, August 1, 1917, Correspondence relative to. (Cd. 261.) 3s.

Peace Treaty between the Allied and Associated Powers and Germany, signed at Versailles, June 28, 1919. With maps. (Treaty Series, 1919, No. 4.) 4s. 6d.

———. Supplementary protocol. (Treaty Series, 1919, No. 5.) 1s. 1½d.

———. Agreement with regard to the military occupation of the Rhine territories. (Treaty Series, 1919, No. 7.) 2d.

———. Act of Parliament Relating to. 9 and 10 Geo. V., Ch. 33.

———. Declaration by the United States, Great Britain and France in regard to the occupation of the Rhine Provinces. (Cd. 240.) 1s. 1½d.

———. Reply of the Allied and Associated Powers to the observations of the German delegation on the conditions of peace. (Miscellaneous No. 4, 1919.) 11s. 1½d.

Persia, Agreement between His Britannic Majesty's Government and. Signed at Teheran, August 9, 1919. (Persia No. 1, 1919.) 2d.

Poland, Treaty of Peace between the United States of America, the

British Empire, France, Italy, and Japan. Signed at Versailles, June 28, 1919. (Treaty Series, 1919, No. 8.) 4s.  $\frac{1}{2}$ d.

Safety of Life at Sea. Order in Council, June 25, 1919, further postponing the coming into operation of the Merchant Shipping Convention Act, 1914, until January 1, 1920. (St. R. & O. 1919, No. 883.) 1s.  $\frac{1}{2}$ d.

Trading with the Enemy. Poland. General license, April 1, 1919. (St. R. & O. 1919, No. 409.) 1s.  $\frac{1}{2}$ d.

———. German Austria. General license, April 3, 1919. (St. R. & O. 1919, No. 422.) 1s.  $\frac{1}{2}$ d.

———. Occupied Territories on Right Bank of the Rhine. General License, May 6, 1919. (St. R. & O. 1919, No. 558.)

———. Germany. General License, May 24, 1919. (St. R. & O. 1919, No. 645.) 1s.  $\frac{1}{2}$ d.

———. Gifts of foodstuffs, clothing, etc., to enemy countries. General License, May 28, 1919. (St. R. & O. 1919, No. 656.) 1s.  $\frac{1}{2}$ d.

———. Opening Credits on Behalf of Enemies. General License, June 1, 1919. (St. R. & O. 1919, No. 686.) 1s.  $\frac{1}{2}$ d.

———. Dealings in German-owned Goods ex Enemy Vessels. General License, June 6, 1919. (St. R. & O. 1919, No. 698.) 1s.  $\frac{1}{2}$ d.

———. Fees in respect of patents, designs and trade-marks. General License, July 4, 1919. (St. R. & O. 1919, No. 840.) 1s.  $\frac{1}{2}$ d.

———. German Austria. General License, July 12, 1919. (St. R. & O. 1919, No. 872.) 1s.  $\frac{1}{2}$ d.

———. Germany. General License, July 12, 1919. (St. R. & O. 1919, No. 873.) 1s.  $\frac{1}{2}$ d.

———. Hungary. General License, August 6, 1919. (St. R. & O. 1919, No. 994.) 1s.  $\frac{1}{2}$ d.

———. Proclamation, together with the consolidated list of persons and firms in countries, other than enemy countries, with whom persons and firms in the United Kingdom are prohibited from trading. With notes for British merchants engaged in foreign trade. Complete to February 21, 1919. (No. 76a.) 8s.  $\frac{1}{2}$ d.

Turkish Prisons. Reports on conditions in. (Miscellaneous No. 6, 1919.) 3d.

War of 1914-1918. Naval and military despatches relating to operations. VIII. July, 1917, to June, 1918. 1s. 9 $\frac{1}{2}$ d.



UNITED STATES <sup>2</sup>

Aliens. Deportation of certain undesirable aliens and denial of re-admission to those deported. Report to accompany H. R. 6750. July 22, 1919. 3 p. (H. rp. 143.) *Immigration and Naturalization Committee.*

Alien Enemies. Deportation of interned alien enemies and convicted alien enemies. Hearings on H. R. 6750, July 16 and 17, 1919. 43 p. *Immigration and Naturalization Committee.*

Alien Property Custodian. Detailed report of all proceedings under Trading with the Enemy Act, calendar year 1918, and to close of business on February 15, 1919. 607 p. 4 pl. Paper, 55c.

Bolshevik Propaganda. Hearings before subcommittee pursuant to S. Res. 439 and 469, February 11-March 10, 1919. 1265 p. *Judiciary Committee.*

Collisions at Sea. Rules to prevent collisions of vessels on Great Lakes. June 20, 1919. 7 p. (Dept. circular 231, 2d ed.) *Bureau of Navigation.*

Colombia. Treaty signed at Bogota, April 6, 1914, between United States and Republic of Colombia, for settlement of their differences arising out of events which took place on Isthmus of Panama in November, 1903, showing amendments suggested by Committee on Foreign Relations. 1919. 7 p. (S. doc. 64.) *Senate.*

Constitutions of States at War, 1914-1918 (with bibliography); edited by H. F. Wright, 1919. vii. 679 p. *State Department.*

Costa Rica. Report to accompany S. Res. 105 requesting information whether Nicaragua has been or is permitted to invade Costa Rica, and why Costa Rica was not permitted to sign treaty of peace at Versailles. July 14, 1919. 1 p. (S. rp. 83.) *Foreign Relations Committee.*

———. Response to Resolution. August 21, 1919. 7 p. (S. doc. 77.)

Crignier, Madame. Report in relation to claim presented by Government of France on account of losses sustained by Madame Crignier in connection with search for body of John Paul Jones. July 21, 1919. 13 p. (H. doc. 156.)

<sup>2</sup> Where prices are given, the document in question may be obtained for the amount noted, from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Czecho-Slovaks. Executive order authorizing Secretary of State to discharge duties heretofore discharged by special committee for rendering financial assistance to Czecho-Slovak military forces in Siberia. July 18, 1919. 1 p. (No. 3119.) *State Department*.

Diplomatic and Consular Service. Information regarding appointments and promotions in consular service of United States. (Reprint, 1919.) 18 p. *State Department*.

Ellis, William T., correspondent of *New York Herald*, Information concerning alleged restraint of, by British authorities in Egypt. (S. doc. 45.) .3 p.

France. Message from President of United States transmitting agreement between United States and France, signed at Versailles, June 28, 1919, to secure Republic of France immediate aid of United States in case of unprovoked aggression against her on part of Germany, and similar agreement between Great Britain and France signed at Versailles, June 28, 1919. 15 p. (S. doc. 63.) French and English. *Senate*.

Germany—Japan. Report to accompany S. Res. 110 requesting copy of treaty negotiated between Oda, Japanese plenipotentiary, and German Ambassador Lucius. July 14, 1919. 2 p. (S. rp. 84.) *Foreign Relations Committee*.

Haitien Customs Receivership. Report, August 29-September 30, 1916, and fiscal year ending September 30, 1917. 1919. 40 p. *State Department*.

Immigration Laws, rules of May 1, 1917. 3d ed. March, 1919. 101 p. map. *Immigration Bureau*.

International High Commission. Proposed form of convention concerning commercial travelers. 5 p.

International Labor Conference. Joint resolution to authorize the President to convene meeting of an international labor conference in Washington, D. C. August 15, 1919. 1 p. (Pub. Res. 9.) 5c.

International Relations. Laws of 65th Congress relating to foreign affairs, public resolutions and accompanying proclamations and executive orders. 220 p. *House of Representatives*.

Ireland. Letter advising Senate that attention of M. Clemenceau, president of Peace Conference, had been invited to full text of Senate resolution of June 6, 1919, requesting American Peace Commission to procure hearing for representatives of the people of Ireland. June 20, 1919. 1 p. (S. doc. 35.)

Jewish Persecutions in Poland, Roumania, and Galicia, Letter, in response to resolution, stating action taken by State Department before and in pursuance of resolution in matter of. 2 p. (S. doc. 44.)

League of Nations. Covenants of peace and articles of association proposed by Senator King. 8 p. *Foreign Relations Committee.*

———. Comparison of plan for League of Nations showing original draft as presented to commission with covenant as finally adopted at Peace Conference; also presentation speeches of President of United States relating thereto. 35 p. (S. doc. 7.) Corrected. (S. doc. 46.) *Senate.*

———. Draft of Composite Covenant made by legal advisers of Commission on League of Nations. 8 p. (S. doc. 74.) *Senate.*

———. American Draft of Covenant of League of Nations, with report of Commission of League of Nations. 25 p. (S. doc. 70.) *Senate.*

———. Letters of Elihu Root relative to. 23 p. (S. doc. 41.) *Senate.*

Mexico, Claims against. Report to accompany S. Res. 106 directing Committee on Foreign Relations to investigate outrages on citizens of United States in Mexico. August 8, 1919. 1 p. (S. rp. 145.) *Foreign Relations Committee.*

———. Claims of American Citizens against, Response to resolution requesting information as to. May 20, 1919. 4 p. (S. doc. 1.) *State Department.*

———. Hearings on H. J. Res. 124 for appointment of committee for investigation of Mexican situation. 1919. Pts. 1, 2, ii+1-152 p. map. *Rules Committee.*

———. Proclamation making it unlawful to export arms or munitions to. July 12, 1919. 2 p. (No. 1530.) *State Department.*

———. Report, in response to resolution, in respect to claims against Mexico for destruction of life and property of American citizens in that country. August 1, 1919. 29 p. (S. doc. 67.)

———. Report, in response to resolution, in respect to action taken by United States with relation to protection of landed estates of American citizens in Mexico. August 11, 1919. 2 p. (S. doc. 71.)

Naturalization. Laws of 65th Congress relating to. 11 p. *House of Representatives.*

North German Lloyd Dock Company and Hamburg-American

docks, Proclamation fixing compensation for. December 3, 1918. (No. 1504 A.) *State Department*.

Passports. Message transmitting communication from Secretary of State suggesting that passport-control act of May 22, 1918, be extended for one year after peace shall have been concluded. August 25, 1919. 9 p. (S. doc. 79.)

Peace Treaty with Germany. 194 p. (S. doc. 49.) *Senate*.

———. Protocol to, signed at Versailles, June 28, 1919. 8 p. (S. doc. 66.) French and English. *Senate*.

———. Agreement between United States, Belgium, British Empire, and France, and Germany with regard to military occupation of territories of the Rhine, signed at Versailles, June 28, 1919. 7 p. (S. doc. 75.); 17 p. (S. doc. 81.) French and English. *Senate*.

———. 1919. Provisional draft of economic clauses of, with explanatory headings and marginal comments for use of American delegates, presented to Senate Committee on Foreign Relations by Bernard Baruch. 68 p. (Senate Committee print.) *Foreign Relations Committee*.

———. Report of conference between members of Senate Committee on Foreign Relations and President of United States at White House, August 19, 1919. 56 p. (S. doc. 76.) *Foreign Relations Committee*.

———. Semi-official summary of treaty as handed to German plenipotentiaries May 7, 1919. 38 p. *Senate*.

———. Information, in response to resolution, concerning purported German-Japanese treaty, adjustment in reference to Shantung, and intimidation of Chinese peace delegates by Japan. August 11, 1919. 2 p. (S. doc. 72.)

Philippine Independence. Hearings before Committee on Philippines, Senate, and Committee on Insular Affairs, House, held jointly. 144 p. *Philippines Committee*.

Philippine Islands. Special reports on, by Wm. H. Taft, Secretary of War, January 23, 1908, and J. M. Dickinson, Secretary of War, November 23, 1910. 189 p. *War Department*.

Poland. Agreement between United States, British Empire, France, Italy, and Japan, on the one hand, and Poland on the other hand, signed at Versailles, June 28, 1919. 25 p. (S. doc. 82.) French and English. *Senate*.

Radiotelegraphy. Views of Navy Department on radio communication. July 28, 1919. 6 p. (H. doc. 165.). *Navy Department*.

Reconstruction (World War). Select list of references on economic reconstruction, including reports of British Ministry of Reconstruction. 1919. 47 p. Paper, 10c.

Seamen's Act of March 4, 1915, as amended June 12, 1916. 25 p. *House of Representatives*.

Siberia. Message, in response to resolution, informing Senate of reasons for sending United States soldiers to and maintaining them in Siberia, with statement by State Department issued August 5, 1918, relative to American-Japanese action in Siberia. July 25, 1919. 5 p. (S. doc. 60.)

St. Lawrence River Power Co., Interim order, opinions, and hearings in matter of application of, for approval of construction and maintenance of submerged weir in south channel of St. Lawrence River near mouth of its power canal at Massena, N. Y. *International Joint Commission on Boundary Waters between United States and Canada*.

Trading with the Enemy Act of October 6, 1917, as amended March 28 and September 24, 1918. 21 p. *House of Representatives*.

Trading with the Enemy Act and amendments thereto, with proclamations, executive orders, and orders issued by Acting Secretary of State, issued thereunder to April 8, 1919. 102 p. *Alien Property Custodian*.

Treaty-making Power in Various Countries. Collection of memoranda concerning negotiation, conclusion, and ratification of treaties and conventions, with excerpts from fundamental laws. 1919. 89 p. *State Department*.

Treaties. Methods and procedure in foreign countries relative to ratification of treaties, also extracts from Executive Journal of Senate relative to proceedings in cases of treaties rejected by Senate. 1919. 280 p. (S. doc. 26.) *Senate*.

———. Proposed abrogation of. Response to resolution requesting information concerning. May 20, 1919. 39 p. (S. doc. 2.) *State Department*.

Wilson, President. Addresses, Boston, Mass., February 24, 1919, and New York, N. Y., March 4, 1919. 18 p. Paper, 5c.

Wilson, President. Addresses on first trip to Europe, December 3, 1918-February 24, 1919. 58 p. Paper, 5c. Reprint with additions. 60 p. Paper, 5c.

———. Address to Senate, July 10, 1919, relating to peace treaty with Germany. 13 p. Paper, 5c.

World War, 1914-1918, Estimate of number of men of principal nations engaged in, who were killed in battle or died of wounds. 4 p. (S. doc. 40.) *War Department*.

GEORGE A. FINCH.

## JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

HIS BRITISH MAJESTY'S PROCURATOR-GENERAL IN EGYPT *v.* DEUTSCHE  
KOHLEN DEPOT GESELLSCHAFT<sup>1</sup>

*Judicial Committee of the Privy Council*

(Lord Sumner, Lord Parmoor, and Lord Wrenbury)

Decided December 13, 1918

THIS was an appeal and cross-appeal from a judgment of the Supreme Court for Egypt in Prize, by which certain tugs, motor-boats, lighters, and other craft, the property of the Deutsche Kohlen Company, were declared to have belonged at the time of seizure to enemies of the Crown, and to have been properly seized as good and lawful prize, and they were directed to be detained until further orders. The Crown appealed from so much of the judgment as ordered that the craft should be detained only, and claimed that they should be condemned and confiscated. The company cross-appealed, and submitted that the craft were liable neither to condemnation nor detention.

The Solicitor-General and Mr. Gavin Simonds appeared for the Crown; Sir Erle Richards, K. C., and Mr. Balloch for the company.

The Deutsche Kohlen Company, of Hamburg, had a branch at Port Saïd, where it supplied coal to passing steamers. It owned and used a number of tugs, motor-boats, and lighters, none of which was registered in the German Mercantile Marine. After the outbreak of war it carried on its operations under a limited license granted by the Egyptian Government, but ultimately the business was wound up and liquidated, and the company's craft requisitioned and used by the British authorities. The crown claimed the condemnation of the craft as belonging to enemies. Judge Grain rejected the company's contention that the craft were exempt from capture under

<sup>1</sup> *The Times Law Reports*, Vol. XXXV, p. 159.

Article 3 of the Eleventh Hague Convention, as being "vessels employed exclusively in coast fisheries, or small boats engaged in local trade." But he held, contrary to the submission of the Crown, that the craft were "merchant ships" within the meaning of Article 2 of the Sixth Hague Convention, and were liable only to be detained, not to be condemned or confiscated. From these decisions both parties appealed.

The arguments were originally heard in February last, but were broken off to enable the Crown to procure from Egypt certain correspondence bearing on the question whether there had been any seizure of the craft.

The Solicitor-General said that there had been no formal seizure, as any such act would have been a breach of the Suez Canal Convention, but he submitted that the steps taken by the authorities amounted to seizure in law. The possession of the craft by the naval and military forces was tantamount to seizure.

Sir Erle Richards, K. C., contended that the evidence from Egypt showed that there had been no capture, and therefore the court had no jurisdiction, for it was necessary to have capture as a basis of the proceedings. The craft were merchant ships, which were not liable to seizure, and, besides, they had been working under a license from the Egyptian Government, and could not therefore be seized. They were also protected from seizure by the Suez Canal Convention.

Lord Sumner, in delivering their Lordships' considered judgment, said: The Vice-Admiralty Court at Alexandria decided this case on the application of The Hague Conventions, numbers VI (Arts. 1 and 2) and XI (Article 3). The learned judge held that the craft were not immune from seizure, but only made a detention order against them. Accordingly there are cross-appeals. One party claims condemnation, the other immediate release. Each prepared his case on the assumption that there had been a valid seizure and only sought to inquire, which convention, if either, applied, for if neither was applicable, condemnation followed. During the hearing it appeared that the record contained no account of the circumstances of the seizure, nor indeed expressly alleged any seizure at all, and although it might have been enough to have relied upon the recital in the decree under review, that the various craft were "lawfully seized as good and lawful prize," on such a point their Lordships were



reluctant to refuse examination into the facts, when a doubt was brought to their notice. Accordingly they directed that further information should be obtained from Egypt. The material now forthcoming is neither as explicit nor as simple as might have been expected. Before the war the business of the Deutsche Kohlen Depot Gesellschaft in Egypt was to coal steamers passing through the Suez Canal. They owned a large fleet of lighters with the tugs required to tow them. Most of them were of steel, but a few were of wood. Four were water tank boats and the rest chiefly coal barges. There were also for general communication between ship and shore and for harbor business three fast launches. The tugs were about 57 by 14 feet; their tonnage was about 27 tons, and their engines must have been of high power. The lighters, 77 in number, ranged from 82 by 20 feet to 46 by 10 feet. Their average tonnage was nearly 130 tons. Where they were built is not stated, though it is reasonable to suppose that all of them, except perhaps the wooden barges, had come out from Germany, but whether afloat or not is unknown. The tugs were capable of open sea voyages, but in fact they were only employed in Port Saïd harbor. The lighters were incapable of taking the open sea. When war broke out the company's business was for some time allowed to proceed as before. About the end of 1914 some of the lighters were requisitioned, and in October, 1915, a license was granted to the company to continue supplying the rest to the British Coaling Company (Limited). At the end of April, 1916, this license was revoked, and an official was appointed by the General Officer Commanding in Egypt as receiver of the business, "with instructions to liquidate the same." He is styled the liquidator, and, in the name of the Deutsche Kohlen Depot Gesellschaft, is respondent to this appeal. The proclamation under which he was appointed appeared in the *Journal Officiel Extraordinaire* of January 25, 1915, and provided that "every receiver shall have such powers as shall be prescribed in his instructions for managing the property entrusted to him," but he appears to have been simply placed under the control of the licensing officer, to whose order he was bound to conform. His position was very different from that of a liquidator appointed in legal proceedings. His principal function appears to have been to hold possession of such of the craft as were not from time to time in the use and possession of the naval and military authorities, and with them to supply the requirements of the British

Coaling Company (Limited). Though variously employed and in various places the several craft have throughout been treated as one coaling fleet and as an installation for a single business, physically divisible into units, but managed as a whole.

During the early part of the war the Procurator-General, the present appellant, had been fully occupied in taking proceedings against ships and cargoes in the court of Alexandria, but in the spring of 1916 he decided to seek the condemnation of the fleet of the Deutsche Kohlen Depôt Gesellschaft. He did not wish actually to lay hands on the individual units. They were numerous; they often had no one on board, some were here, some there; most of them were no doubt in the harbors of Port Saïd or Suez, but some were up the Canal and all were being usefully and indispensably employed for military, naval, or commercial purposes. He had also to consider, no doubt, the terms of the Suez Canal Conventions, since the course pursued in the case of *The Pindos* (32 *The Times L. R.*, 489; [1916] 2 A. C., 193) was inapplicable to a fleet of such a size and character. Such of the craft as were not already in the hands of the naval and military authorities were in the possession of the liquidator, though physically scattered up and down. In May, 1916, he instructed the marshal of the Prize Court to report to him on the company's floating craft, and he asked the liquidator to furnish a list of them in June. In July he saw the liquidator and intimated, to quote his affidavit:

That I proposed to take proceedings against the craft, and owing to the difficulty in serving on the particular craft, I would ask for an order for substituted service on him. It was then agreed between us that, as liquidator, he should, on proceedings being taken, continue to hold such of the tugs and lighters as were in his possession at the disposal of the Crown and the Prize Court. I also arranged with Mr. Bristow, manager of the British Coaling Depôts, and with Mr. Lloyd Jones that the manipulation contract, which was being carried on by the liquidator, should continue to be so carried on as between the Crown and the Coaling Depôts.

He further informed the licensing officer what he desired to do, and with him "came to an understanding that the liquidator should hold the craft and continue to act on behalf of the Crown from the time the proceedings were instituted against the craft."

What, then, is the fair conclusion from all this? It is clear that the Procurator-General meant to bring this fleet before the Prize

Court with a view to its condemnation, and his general intention must have been to do whatever was necessary to give the court jurisdiction. He desired to avoid taking physical possession of the craft *seriatim*, yet he equally desired that all should be validly seized. The liquidator, Mr. Lloyd Jones, had them under his control, and those which were not already in the hands of the naval and military officers of the Crown were being used by Mr. Bristow, above mentioned. The liquidator does not contradict the Procurator's evidence, and in prosecuting his cross-appeal did not question that the Vice-Admiralty Court had jurisdiction.

Their Lordships take the possession respectively of the naval and military authorities and of the liquidator to have been, by agreement, the possession of the marshal of the Prize Court until proceedings were taken, and thereafter to have been "continued" on behalf of the court, the actual requirements of the forces and of the British Coaling Company being satisfied in the meantime and till further order. It is as though the Procurator had pointed to the fleet, assembled in the harbor under the liquidator's eyes, and had said, "Submit to treat this fleet as seized and undertake to do with the vessels as the court and its marshal may direct, or I will at once use force, which I have at hand."

Their Lordships do not overlook the fact that both the Procurator and the liquidator elsewhere seem to suggest that the question was rather one of service of proceedings *in rem* than of capture, for they give August 8, 1916, as the date of the seizure, which was actually the date when substituted service was effected on the liquidator. The liquidator, however, was chiefly concerned with his disbursements, and it was in this connection that the date of seizure was given to and accepted by the court as August 8th in an interlocutory application. Their Lordships do not think this sufficient to negative the inference to be drawn from the procurator's account of his agreement with the liquidator, and as their Lordships are not asked to suppose that the Procurator completely overlooked the importance of seizure, they conclude that a sufficient seizure having been arranged by consent, the matter subsequently received no further attention.

This view of the facts disposes of two other matters. In spite of a general statement, made on the application for leave to effect substituted service, that the craft to the number of eighty-five were in various places along the canal and constantly changing their

position, no evidence is forthcoming to enable any one lighter to be discriminated from the rest, and the coal barges must for the most part have been kept in the harbors of Port Saïd and Suez. Sir Erle Richards for the liquidator stated to their Lordships that on the present materials he could not ask for a decision, that the craft were seized in inland waters, and were not the subjects of maritime prize at all, and, indeed, such a contention would have precluded the liquidator from obtaining a judicial decision on the effect of the Hague Convention, which is the true issue in the case and in strictness the only issue, which can be presented as of right in the interests of an enemy company. As no point of this kind was made at the hearing, their Lordships will deal with the whole fleet as having been enemy property seized in port, and as such liable to be condemned in a court of prize.

The liquidator further contended that the seizure was bad as being a breach of the Suez Canal Convention, 1888, Article IV. It does not, however, follow that a seizure, otherwise good, must be invalid for all purposes merely because it contravenes some term in an international instrument cognizable in a prize court.

It is legitimate to consider the object with which the convention was entered into, the scope of its provisions, and the mischief which it was intended to prevent. As was pointed out in the *Sudmark* (34 *The Times L. R.*, 289; [1917] A. C., at p. 623), this convention does not stipulate any penalty for its infraction, and a court of prize is not warranted in creating a penalty where the convention creates none, or in declaring a seizure to be bad because in no other form could it effectively create a penalty at all. Again, their Lordships cannot forget that, long before the seizure in the present case, the Canal generally had been made a field of battle by the armies of the Sublime Porte, acting in alliance with those of the German Emperor, and for want of mutuality alone the convention could not be used to protect the property of an enemy whose sovereign had already fundamentally disregarded it. There is, however, on the facts a simpler means of disposing of the point under the terms of Article IV., "*Aucun droit de guerre ne pourra être exercé dans le canal et dans ses ports d'accès.*" In the present case the exercise of any right of war in the Canal was carefully avoided. What was done, though constituting a seizure for the purposes of prize jurisdiction, was done ashore by word of mouth, and involved no belligerent con-

duct in the Canal or its ports of access contrary to the convention. The *de facto* tranquillity, which in the interest of neutrals the convention secures, was fully respected. The interests of neutrals do not demand that acts done in Egyptian territory which do not affect the Canal or its ports of access should be invalidated on the mere ground that they took place in its neighborhood.

To turn to The Hague Conventions, can these tugs and lighters be covered by the words of Convention XI, "*Bateaux exclusivement affectés à des services de petite navigation locale?*" For some reason, which is not apparent, the French text makes the element of size a quality of the service in which the craft are engaged; in the English it is a quality of the craft themselves. In the present case it is difficult to describe either the craft or the navigation in which they engage as small. As applied to the navigation the words evidently predicate of it a petty, local character. These craft are an integral and indispensable adjunct of most important ocean voyages, and without them voyages through the Suez Canal would be impracticable. Their service is the reverse of petty or local. Nor are the craft themselves truly small. The tugs must be of high power, and their mere tonnage and dimensions are therefore not decisive. Few of the barges are even of modest size; none is insignificant, and most of them are of ample burden. Their Lordships are satisfied that, whatever be the precise limits of this article, it was never contemplated that such craft as these should fall within them, and they think the same of the argument that they can be assimilated to fishing boats, so as to entitle them to the tenderness which has often been extended to fisherman under international law.

The application of the Eleventh Convention does not depend merely on the question whether these craft can or cannot be styled "navires de commerce" with tolerable propriety. The construction of the article which would bring under that term all floating structures not "navires d'état" was rejected by their Lordships in *The Germania* (33 *The Times L. R.*, 273; [1917] A. C., at p. 378, and in delivering the opinion of the Board, Lord Parmoor observed at p. 378), "There is nothing in the context of Article 2 which would suggest that the expression, 'un navire de commerce' includes every class of private vessel." It would be a mistake to seek in the Hague Conventions, or in the terms there employed, exhaustive categories of every kind of *bâtiment* afloat, or to suppose that, taken collectively,

the *bateaux*, *bâtiments* and *navires* there mentioned cover the whole field of possible means of carriage by water so as to make provision somewhere or other for each and all of them. Conventions concluded between nations so diversely interested rest principally on compromise, and cannot be expected to exhibit the comprehensiveness of a code.

The language of the general preamble to the article is of importance, but the actual text must come first. The articles contemplate ships—*navires de commerce*—which in the course of a voyage from a port of departure or to a port of destination enter a port and there find themselves entangled in hostilities of which they were unaware, or ships also commercially engaged upon a voyage, finding themselves in a port, whether of loading, of call, or of discharge, which by the outbreak of war becomes an enemy port, and they provide days of grace, in order that such ships may have their chance to go in peace, and deal specifically with the case in which *force majeure* prevents them from availing themselves of this opportunity. The picture so drawn is plain, and, if there are vessels entitled to the designation of *navires de commerce* which lie outside this picture, then the scope of the article affords them no assistance, be their designation on their classification what it will. Neither collectively nor individually was the fleet of the Deutsche Kohlen Depôt engaged in or between ports of departure and discharge. It did not find itself in Port Saïd in the course of a voyage. Port Saïd was its home, nor had it any other. No *force majeure* affected it. In point of fact, after the outbreak of war it went on with its regular employment in its permanent home as before, and no opportunity for departure was desired, for there was neither the intention nor the means for taking it elsewhere. This fleet was the very opposite of the *navires de commerce* referred to, and was as fixed in its habitat and in its orbit as trains of coal trucks from which steamers take their coal under a tip. If so, it is unnecessary to express an opinion whether the craft could be called *navires*, and, if so, whether they were also *navires de commerce*. To them Convention XI had no application at all.

In the alternative, but only in the alternative, the question arises whether any benefit could be claimed under the convention for craft which did not avail themselves of the days of grace and were not prevented by *force majeure* from doing so. The "Décision" of the

Egyptian Government, dated August 5, 1914, gave permission to German ships, which found themselves in Egyptian ports at the outbreak of hostilities, to quit the port up to sunset of August 14. Let it be that some of these craft could not go, because they were not built for sea, though no doubt with some alterations they could have been made fairly seaworthy; let it be that none of the members of the fleet had any business or occupation elsewhere. This does not secure to them the benefit of the convention without complying with its terms: it is only ground for saying that they are not within the scope of the convention at all. They remained in the port and continued their usual employment and took the risk involved in the fact that by Article XIII of the same *Décision* "*les forces navales et militaires de Sa Majesté Britannique* pourront exercer tout droit de guerre" in Egyptian waters, apart of course from the terms of the Suez Canal Convention. Remaining where they were conferred on them no irrevocable permission to stay and trade, no permanent immunity from the belligerent rights of the Crown. Later on a license was applied for and obtained, but before seizure that license had been duly revoked. Thereafter at any rate the liquidator could not invoke for their protection the principle that "When persons are allowed to remain either for a specified time after the commencement of war or during good behaviour they are exonerated from the disabilities of enemies for such time as they in fact stay," *Princess Thurn and Taxis v. Moffit* (31 *The Times L. R.*, 24; [1915] 1 Ch., at p. 61), even if such a principle is applicable to personal property only, when no enemy person is actually present or in charge of it.

In the result the appeal succeeds and should be allowed, and the cross-appeal fails and should be dismissed, in each case with costs. The decree of condemnation must be amended by omitting the words "and that the said tugs, lighters, motor-boats, and floating craft be detained until further order of the court," as well as the subsequent words "and detention," and the subjects seized must be forthwith condemned and confiscated.

Their Lordships will humbly advise his Majesty accordingly.

THE LEONORA<sup>1</sup>*Judicial Committee of the Privy Council*

(Lord Sumner, Lord Parmoor, Lord Wrenbury, Lord Sterndale,  
and Sir Arthur Channell)

Decided July 31, 1919

The Reprisals Order in Council of February 16, 1917, which authorizes the capture and condemnation of vessels carrying cargoes to or from countries contiguous to Germany, if such vessels have not first called at a British or Allied port for examination, was, in the circumstances existing at the date of the Order, justified by the recognized principles of international law, and the consequential results to neutrals give them no right to complain or to claim compensation.

Decision of Evans, P. (34 *The Times L. R.*, 366; [1918] p. 182) affirmed.

These were appeals from a judgment of the late President of the Admiralty Division in Prize (see 34 *The Times L. R.*, 366; [1918] p. 182) condemning the steamship *Leonora* and her cargo as good and lawful prize.

Sir John Simon, K. C., Sir Erle Richards, K. C., Mr. Mackinnon, K. C., and Mr. W. R. Bisschop appeared for the appellant ship-owners; Mr. Leslie Scott, K. C., Mr. Balloch, Mr. Stuart Bevan, and Mr. C. T. Le Quesne for the appellant cargo owners; the Attorney-General, the Solicitor-General, Mr. Greer, K. C., Mr. Clive Lawrence, and Mr. Pearce Higgins for the Crown.

The appeal of the owners of the ship was first taken.

The main question raised was the validity of the Order in Council of February 16, 1917, commonly known as the Second Retaliatory Order. By a previous order of March 11, 1915, the Crown had claimed a right of requiring neutral vessels carrying goods of enemy origin to discharge those goods in a British port irrespective of the destination or character of the goods. The claim was justified as retaliation for illegal acts by the German Government. By the order, no penalty was imposed on neutral vessels. Under the second order, a neutral vessel carrying goods of enemy origin was liable to capture and condemnation unless on her voyage she called at an appointed British or Allied port. The appeal was therefore brought to decide whether a belligerent could exercise a right of retaliation against his enemy to the extent of seizing and forfeiting neutral vessels carrying goods of enemy origin unless they deviated from their voyage and

<sup>1</sup> *The Times Law Reports*, Vol. XXXV, No. 35, pp. 719-726.



called at an appointed British port, although they were not engaged in any trade that rendered them subject to condemnation by international law.

The *Leonora*, a Dutch steamer, owner by the appellants, a limited company, was registered in the Netherlands. At the time of capture she was on a voyage from Rotterdam to Stockholm (both neutral ports) with a cargo of coal bought by neutral merchants from Belgium colliery owners at the pit's mouth. At that time the purchase of and payment for coal in Belgium was regulated and controlled by the German authorities. The *Leonora* was captured on the day—August 16, 1917—when she left Rotterdam by a British torpedo-boat and was taken to Harwich, where she was seized as prize. The Crown applied for a decree of condemnation on the ground that the coal on board was of enemy origin or was enemy property. The owners sought the release of the vessel, urging that a neutral vessel carrying goods the property of neutral merchants from one neutral port to another was not liable to condemnation by international law.

The President decided that the retaliatory order was not inconsistent with, or essentially contrary to, the principles of the law of nations; that the appointment of a port of call for examination as laid down in the order was not a condition precedent to the condemnation of the ship, and that the coal on board was of enemy origin. He therefore condemned the *Leonora* and her cargo as good and lawful prize, but he gave the owners leave to appeal.

SIR JOHN SIMON, in opening the arguments, said the *Leonora* when seized was on a route which lay far away from any British port. The question was whether the retaliatory order did not put on the neutral an unreasonable burden in requiring ships to go a long way out of their course to reach a British port. The *Leonora*, in her course from Rotterdam, would have had to go through a narrow lane between the British mine-field on her starboard and the German submarines on her port in order to reach a British port. The main point for the appellants was that the second retaliatory order was one which imposed a punishment the most severe that international law could impose on a neutral ship which left one neutral port for another, carrying a cargo which belonged to neutrals, and for the first time the order introduced, not a provision which under the head of retaliation would inflict inconvenience on a neutral in his operations, but the capital punishment of international law upon the ship. The mere fact that the order had been issued did not in itself confer on the Prize Court either the power or the duty to punish neutral ships for something which under international law was not an offence.

The first retaliatory order imposed restrictions upon the freedom of action of neutral ships, and when a neutral attempted to complain of that, as in the case of the *Stigstad* (35 *The Times L. R.*, 176; [1919]

A. C., 279,<sup>2</sup> the ship was told that it could not go to the Prize Court and claim compensation because it was inconvenienced by a regulation which, having regard to the conditions, was justified as against the enemy. The second retaliatory order not only said that the neutral was not entitled to compensation, but created a new international law offence and asked the Prize Court to condemn any ship which had committed it. It was within the rights of a belligerent to make orders which created additional inconvenience for neutrals, but not to create a new offence. The order therefore was illegal.

LORD SUMNER said that if it was part of international law that a belligerent might retaliate, then a Prize Court in enforcing the order was only giving effect to a new chapter in well-established international law.

SIR JOHN SIMON said that the cargo was not of enemy origin within the true meaning of the Order in Council. In the case of retaliatory orders a neutral must put up with incidental inconvenience, the reason being that the belligerent was not attacking the neutral but was exercising a right which had sprung up in consequence of the bad conduct of his opponent; but while a neutral must suffer inconvenience, a retaliatory order should not expose him to the loss of his property by decree of a prize court. The inconvenience to which the second retaliatory order exposed a neutral was unreasonable and excessive. A neutral had certain rights, and those rights could not be turned into wrongs by a retaliatory order. International law was concerned with securing a true balance between the rights of neutrals and the rights of belligerents. One must work a retaliatory order so as not to forfeit the neutral's vested rights.

SIR ARTHUR CHANNELL.—Does not that take away the possibility of the power of retaliation? If your enemy does a wrong, you must do the same by way of retaliation.

SIR JOHN SIMON.—It is idle to talk about the rights of neutrals under international law if by the wrongdoing of belligerents those rights can be whittled away.

SIR JOHN SIMON, continuing his argument for the shipowners, said that the second retaliatory order was not only wrong in kind, but excessive in degree. In carrying out the order, the captain of the *Leonora* had said that he would have had to run enormous risks in going to and returning from a British port, as he would have had to pass over the British and German mine areas. Indiscriminate sinking was announced by the Germans on February 1, and this was followed by the second retaliatory order. In the meantime, the Admiralty took action quite inconsistent with what the order said neutral vessels must do. The Admiralty announced that it was dangerous for ships to cross certain areas, and later actually warned neutrals that those areas should be avoided.

<sup>2</sup> This JOURNAL, January, 1919, p. 127.

LORD SUMNER pointed out that ships were merely required to go along a lane.

SIR JOHN SIMON replied that what they were required to do was in the highest degree dangerous, and thus the only terms on which a neutral could escape condemnation were terms of extreme severity.

LORD WRENBURY said that it would be possible to get to a British port in safety by passing along the lane.

SIR JOHN SIMON said that he thought not. The only safe way was for the ship to put herself under the protection of a patrol boat.

LORD SUMNER.—The dangers to which vessels were exposed in crossing the North Sea arose from the illegal acts of the enemy, and therefore the neutral must not say that the retaliatory order, which followed from the illegal acts of the enemy, was directed against the neutral.

SIR JOHN SIMON.—The reasonable thing would have been to indicate to the neutral vessel the course which she could safely take.

LORD SUMNER asked whether counsel said that because the course to the port was dangerous, the right of search ceased.

SIR JOHN SIMON replied that the right of search should not entail upon the vessel additional risks.

LORD SUMNER said that the wrongful acts of the enemy did not take away the undoubted right of search.

SIR JOHN SIMON.—The right was to visit and search, but not to compel a vessel to go to be searched.

LORD SUMNER said there was no order to go and be searched. The order merely said what the Navy would do if a vessel were encountered at sea with a cargo of enemy origin, and added, for the protection of the vessel, that, if she went to a British port, then there would be no condemnation.

SIR JOHN SIMON, continuing, said that, after the *Leonora* had been condemned, and while she was in the service of the British, she was torpedoed and sunk by the enemy. The physical danger and commercial risks were elements which must be taken into consideration when judging of the reasonableness of the order. There was no failure on the part of the *Leonora* to fulfil the order, because there was no appointed port at which she was to call.

The goods on board were not of enemy origin. The coal was Belgian coal, and was bought from Belgian colliery owners. The Germans at the time were only in temporary occupation of Belgium, and had never claimed to exercise sovereignty over it; they had not annexed it; indeed, they most deliberately disclaimed any idea of annexation. One could not properly describe the coal as of enemy origin unless one showed what could not be shown here, either that it was coal which came from Germany or belonged to Germans, or that the natural meaning of the words "enemy origin" had been extended

so as to cover occupied territory. Goods which came from occupied territory could not be of enemy origin.

MR. LESLIE SCOTT, on the part of the owners of the cargo, contended that "enemy origin" in the order in council meant enemy country, and therefore the coal from Belgian collieries could not be condemned. The right of retaliation was limited by the rights of neutrals. Supposing no question of retaliation had arisen at all, to call upon all neutral vessels to go out of their voyage and come to this country to be searched would be an exercise of sovereignty over the subjects of other states for which there was no justification in international law. If, apart from retaliation, there was no right to call upon all neutral vessels to come to this country, then there was no authority for saying that by way of retaliation that could be done, and if this were the effect of the order it was going far beyond any legal right which could possibly be read into the doctrine of retaliation.

SIR ARTHUR CHANNELL.—The Germans say, "Down you go," but we say, "In you come."

LORD SUMNER asked whether counsel agreed that it would be right if a cruiser encountered a vessel at sea to order her to come in.

MR. SCOTT replied that he was prepared to concede that when a vessel had been visited the cruiser might ask her to come into port for an effective search.

SIR ARTHUR CHANNELL.—If vessels never were encountered at sea, could any conceivable harm be done by requiring them to come in to be searched? If you don't catch them you cannot enforce it.

MR. SCOTT said that as to the right of visit and search he would argue that a request to a vessel to come in to be searched, if there was justifiable occasion for search, was not illegal. He conceded that that would be justifiable if there were reasonable grounds for suspicion, provided that the ship was guided across the minefield in safety.

LORD SUMNER.—Provided that she was convoyed in safety?

MR. SCOTT.—Yes. But in this case the vessel was brought in because they were trying to enforce this order against her, and not for any other reason.

LORD SUMNER said that courts of prize endeavored to find a compromise between the right of retaliation and the claim of neutrals not to be the victims of retaliation, and that compromise, however unsatisfactory, was at least better than war.

MR. SCOTT said that there were certain limits to belligerent and neutral rights which were always recognized, and the function of prize courts was to find out what were the generally recognized limits of those rights. There was no authority for the proposition that the belligerent in exercising his right of retaliation could alter the legal rights of neutrals. The belligerent, as an executive act, might interfere with the rights of neutrals, but there was no authority for taking

the neutral's property without compensation. There was no principle of retaliation which could cover an Order in Council condemning a neutral ship and cargo. The right of retaliation was based on belligerent necessity, and when neutral goods were seized they must either be restored or paid for as the French provided by their order.

LORD SUMNER said that merely to seize goods and then restore them would be a very ineffective way of dealing with the difficulty aimed at, as the goods would then reach the destination originally intended.

MR. SCOTT replied that for all practical purposes it was found as in the case of the French order, to be quite sufficient to let neutrals know that any goods of enemy origin or destination would be stopped in their voyage.

The SOLICITOR-GENERAL was proceeding to argue the case for the respondent, when LORD SUMNER said that it had been contended that the interference imposed on neutral rights was illegitimate in kind. Their Lordships did not think that the Solicitor-General need trouble to deal with that, nor need they trouble him to discuss the *Stigstad* case (*supra*) in the sense to which that case had been sought to be reduced. They thought that that case bound them to the view that neutrals had not an indefeasible right to trade without any restriction, and that retaliation and blockade were illustrations of a common principle as therein stated. On the question whether there had been a greater degree of interference with the rights of neutrals than was reasonable, their Lordships wished to hear him and also on the question of enemy origin.

The SOLICITOR-GENERAL contended on the question of enemy origin that the coal was under German control. The German control was not merely control of output, but it extended also to the selection of the customer in Sweden.

LORD PARMOOR.—Was not the whole transaction in the nature of an ordinary controlled transaction in war time?

The SOLICITOR-GENERAL replied that he thought it went far beyond that. No control that we knew of extended to another country. In support of his contention that the coal was of enemy origin he pointed out that at the time Belgium was in the military occupation of Germany, who used the country for the military objects of the war. For the purpose of the Order in Council Belgium was at the time an enemy country.

It was important to remember the circumstances when the second retaliatory order was promulgated. At that time nearly all vessels called by agreement at our ports for the examination of their cargoes. There were a certain number which tried to avoid doing so, and these had prize crews put on board and were brought in.

LORD PARMOOR asked what was the meaning of the words in the order, "appointed British or Allied port."

The SOLICITOR-GENERAL replied that two things were being done—either by agreement or by means of capture. We were insisting on an examination in English ports. Directions were constantly being issued by the Admiralty to give indications to vessels what would be a safe course. The order said to neutrals: "If you will ascertain what port is open at the time then you can come in." The SOLICITOR-GENERAL *argued* that there was no ground for the contention that the order was inoperative because no port was appointed by it. It would be absurd to announce that any particular port was definitely appointed, because under the constantly changing conditions there was no port that could be open for more than 48 hours at a time. If vessels intended to call at a port they were expected to find out what port was open, and it would have been folly on the part of neutrals to ask for a definitely appointed port.

LORD PARMOOR.—That means that the neutral had to ascertain what was the port.

The SOLICITOR-GENERAL.—The other side say that is a high-handed action on the part of the Government, but it is nothing of the sort. We simply said, "For the further safety of neutrals there is a port appointed if they will ascertain which it is," and it is not right to treat that as high-handed conduct on the part of the Government.

LORD PARMOOR asked what was the method by which the captain of a vessel could ascertain the port.

The SOLICITOR-GENERAL replied that the Admiralty control was so great that if the vessel had passed out of her port any ship could have told her what was the port of call and the safe course.

LORD SUMNER said that if a vessel started in the direction of the most convenient port, and then inquired what was the appointed port, the inconvenience would consist merely in the deviation from her ordinary course, and that would not be an excessive interference with the rights of the neutral. The order did not say, "a previously appointed port," but a "port that is appointed."

The SOLICITOR-GENERAL said that the British cruisers were everywhere and ready to give all the information that was needed. As soon as one established the proposition that it was not excessive retaliation to declare the seizure and, in certain events, the condemnation of ships and cargoes, the proviso as to calling at a British or Allied port did not raise any difficulty. If he showed that the order was justified, then it was unnecessary to argue as to the effectiveness of the proviso. In the *Stigstad* case (*supra*) the Board said:—

... their Lordships cannot be blind to what is notorious to all the world and is in the recollection of all men—the outrage, namely, committed by the enemy upon law, humanity, and the rights alike of belligerents and neutrals, which led to and, indeed, compelled the adoption of some such policy as is embodied in this Order in Council.

The necessity for the order was shown by the number of neutral ships torpedoed by the Germans, and consequently it was easy to settle the point whether the reprisal was commensurate with the prior wrong done by the enemy. The neutral had no inherent right to continue trading without interference, and could not come and say that the order was bad because it put too great a burden upon him.

MR. GREER, K. C., followed.

SIR ERLE RICHARDS, K. C., in replying on behalf of the appellants, said that "enemy origin" meant goods originating in Germany. The origin of coal was the mine from which it came. Enemy origin was the country from which the goods came. In this case the coal originated in Belgian collieries and was therefore, he submitted, of Belgian origin. Even though Germans controlled the output, that did not make the coal of enemy origin.

LORD SUMNER, in delivering their Lordships' considered judgment, said: The *Leonora*, a Dutch steamship bound from Rotterdam to Stockholm direct, was stopped on August 16, 1917, by his Majesty's torpedo-boat F 77, outside territorial waters shortly after passing Ymuiden. She was taken into Harwich. Her cargo of coal, which was neutral-owned, was the produce of collieries in Belgium. It was not intended that she should call at any British or Allied port, nor had any application been made on her behalf for the appointment of a British port for the examination of her cargo. Both ship and cargo were condemned, pursuant to the Order in Council dated February 16, 1917, and both the shipowners and the cargo owners appeal.

Their Lordships are satisfied that the cargo was "of enemy origin" within the meaning of paragraphs 2 and 3 of that order. The term had been used in the order of March 11, 1915, paragraph 4, and, owing to doubts about the effect of the word "enemy" therein, a further order was made on January 10, 1917, which applied the term "enemy origin," as used in that paragraph, to goods "originating in any enemy country." In the present case the question is one of the interpretation of the third order, that of February 16, 1917, which, beyond saying that it is supplemental to the orders mentioned above, makes no further express reference to them, but from the recital as to the recent proceedings of the German Government it is plain that the order of 1917 dealt with a wider mischief and was intended to have a wider scope than the previous order. It is therefore necessary to have regard to the system of exploitation then in force in Belgium for the advancement of German interests to appreciate the full effect

of the words "enemy origin." It is not necessary to inquire whether, within the terms of the order, a Belgian origin could be regarded as an "enemy" origin for this purpose, or what the effect, if any, of the German occupation might be on the view to be taken of the nationality of persons resident in Belgium. The collieries from which this coal came were included in the German Kohlenzentrale, a system by which the coal production of Belgium was strictly controlled and was compulsorily manipulated, with the object of supporting German exchange and assisting German commercial transactions with neutral countries, especially Holland and Sweden. In particular, the export of Belgian coal to Sweden was encouraged, because it assisted to procure a reciprocal importation of ore from Sweden. The actual sale of this very cargo was arranged in Cologne by an official of the Kohlenzentrale in his own name, nor is it proved that he was, in fact, selling on behalf of some undisclosed principal, either in Belgium or elsewhere. Payment for it was made by lodging Swedish kronor in a Stockholm bank to the credit of the Kohlenzentrale. It is stated in the German regulations that "the amount realized by the sale will be paid to the vendors," whoever they may have been. Perhaps this may have been so, for, if no money at all reached the colliery, presumably the getting of coal there would come to an end, but whatever crumbs may have been allowed to fall from the master's table, the fact is clear that these coals were won, sold, and shipped as part of a German Government trade, carried on for the benefit of the enemy in prosecuting the war. To deny to them the term "of enemy origin," as used in this order, would be pedantic.

The order is devised to give effect to a scheme of retaliation, which will compel the enemy to desist from outrageous conduct by crippling or preventing trade in goods, which in a broad but very real sense he made his own. It does not employ this expression "of enemy origin" as a mere geographical term, or as merely descriptive of the nationality of the original owners of the coal, who were involuntary and probably reluctant victims of the German system. On this point the view of their Lordships is that the learned President's conclusion was right.

The appellants' main case was that the Order in Council was invalid, principally on the ground that it pressed so hardly on neutral merchants and interfered so much with their rights that, as against them, it could not be held to fall within such right of reprisal as a



belligerent enjoys under the Law of Nations. A subordinate part of their argument was, that in its application to the *Leonora* the order was bad, because no British port had been appointed at which she would call for the examination of her cargo. So far as this circumstance forms part of the general hardship to neutrals it will be dealt with presently. As a separate point their Lordships think that it fails, for the language of the Order in Council does not constitute the appointment of some British port for examination of the cargoes, either of this ship or of ships in general, a condition precedent to the application of the order. The proviso relieving vessels, which call at an appointed port, operates not as a prescription of the circumstances in which alone such application is admissible, but merely as a mode of mitigating the stringency of the order. The evidence discloses no reason why the appointment of a convenient port should not have been applied for to facilitate the *Leonora's* voyage, and a difficulty cannot be relied on as a circumstance of excessive inconvenience to neutrals which it was in their power to remove by such simple means.

Upon the validity of the Order in Council itself the appellants advanced a two-fold argument. The major proposition was that the order purported to create an offence, namely, failure to call at a British or Allied port, which is unknown to the Law of Nations, and to impose punishment upon neutrals for committing it; in both respects it was said that the order is incompetent. The minor proposition was that the belligerent's right to take measures of retaliation, such as it is, must be limited, as against neutrals, by the condition that the exercise of that right must not inflict on neutrals an undue or disproportionate degree of inconvenience. In the present case various circumstances of inconvenience were relied on, notably the perils of crossing the North Sea to a British port of call and the fact that no particular port of call in Great Britain had been appointed for the vessel to proceed to.

In *the Stigstad* (35 *The Times L. R.*, 176; [1919] A. C., 279) their Lordships had to decide some at least of the principles on which the exercise of the right of retaliation rests, and by those principles they are bound. In the present case, nevertheless, they have had the advantage of counsel's full reëxamination of the whole subject, and full citation of the authorities, and of a judgment by the President in the Prize Court, which is itself a monument of research. The case

furthermore has been presented in circumstances as favorable to neutrals as possible, for the difference in the stringency of the two Orders in Council, that of 1915 and that of 1917, is marked, since in the case of the later order the consequences of disregarding it have been increased in gravity and the burden imposed on neutrals has become more weighty. If policy or sympathy can be invoked in any case they could be and were invoked here.

Their Lordships, however, after a careful review of their opinion in the *Stigstad* (*supra*), think that they have neither ground to modify, still less to doubt that opinion, even if it were open to them to do so, nor is there any occasion in the present case to embark on a general restatement of the doctrine or a minute reëxamination of the authorities. There are certain rights, which a belligerent enjoys by the Law of Nations in virtue of belligerency, which may be enforced even against neutral subjects and to the prejudice of their perfect freedom of action, and this, because without those rights maritime war would be frustrated and the appeal to the arbitrament of arms be made of no effect. Such, for example, are the rights of visit and search, the right of blockade and the right of preventing traffic in contraband of war. In some cases a part of the mode, in which the right is exercised, consists of some solemn act of proclamation on the part of the belligerent, by which notice is given to all the world of the enforcement of these rights and of the limits set to their exercise. Such is the proclamation of a blockade and the notification of a list of contraband. In these cases the belligerent sovereign does not create a new offence *motu proprio*; he does not, so to speak, legislate or create a new rule of law; he elects to exercise his legal rights and puts them into execution in accordance with the prescriptions of the existing law. Nor, again, in such cases does the retaliating belligerent invest a court of prize with a new jurisdiction or make the court his mandatory to punish a new offence.

The office of a court of prize is to provide a formal and regular sanction for the law of nations applicable to maritime warfare, both between belligerent and belligerent and between belligerent and neutral. Whether the law in question is brought into operation by the act of both belligerents in resorting to war, as is the case with the rules of international law as to hostilities in general, or by the assertion of a particular right arising out of a particular provocation in the course of the war on the part of one of them, it is equally

the duty of a court of prize, by virtue of its general jurisdiction as such, to provide for the regular enforcement of that right, when it is lawfully asserted before it, and not to leave that enforcement to the mere jurisdiction of the sword.

Disregard of a valid measure of retaliation is, as against neutrals, just as justiciable in a court of prize as is breach of blockade or the carriage of contraband of war. The jurisdiction of a court of prize is, at least, as essential in the neutral's interest as in the interest of the belligerent, and if the court is to have power to release in the interest of the one, it must also have inherent power to condemn in justice to the other. Capture and condemnation are the prescriptive and established modes by which the Law of Nations, as applicable to maritime warfare, is enforced. Statutes and international conventions may invest the court with other powers or prescribe other modes of enforcing the law, and the belligerent sovereign may, in the appropriate form, waive part of his rights and disclaim condemnation in favor of some milder sanction, such as detention. In the terms of the present order, which says that a vessel (paragraph 2) shall be "liable to capture and condemnation" and that goods (paragraph 3) shall be "liable to condemnation", some argument has been found for the appellants' main proposition, that the Order in Council creates an offence and attaches this penalty, but their Lordships do not accept this view. The order declares, by way of warning, and, for the sake of completeness, the consequences which may follow from disregard of it; but, if the occasion has given rise to the right to retaliate, if the belligerent has validly availed himself of the occasion, and if the vessel has been encountered at sea in the circumstances mentioned, the right and duty to bring the ship and cargo before a court of prize, as for a justiciable offence against the right of the belligerent, has arisen thereupon, and the jurisdiction to condemn is that which is inherent in the court. That a rebuttable presumption is to be deemed to arise under paragraph 1 and that a saving proviso is added to paragraph 2 are modifications introduced by way of waiver of the sovereign's rights. Had they been omitted the true question would still have been the same, though arising in a more acute form—namely, does this exercise of the right of retaliation upon the enemy occasion inconvenience or injustice to a neutral, so extreme as to invalidate it as against him? In principle it is not the belligerent who creates an offence and imposes a penalty by his own will and

then by his own authority empowers and directs the court of prize to enforce it. It is the Law of Nations, in its application, to maritime warfare, which, at the same time, recognizes the right, of which the belligerent can avail himself *sub modo*, and makes violation of that right, when so availed of, an offence, and is the foundation and authority for the right and duty of the court of prize to condemn, if it finds the capture justified, unless that right has been reduced by statute or otherwise, or that duty has been limited by the waiver of his rights on the part of the sovereign of the captors.

It is equally inadmissible to describe such an Order in Council as this as an executive measure of police on the part of the Crown to prevent an inconvenient trade, or as an authority to a court of prize to punish neutrals for the enjoyment of their liberties and the exercise of their rights. Both descriptions, as is the way with descriptions *arguendo*, beg the question. Undoubtedly, the right of retaliation exists. It is described in the *Zamora* (32 *The Times L. R.*, 436; [1916] 2 A. C., 77); it is decided in the *Stigstad* (*supra*), as it has so often been decided by Sir William Scott over a century ago. It would be disastrous for the neutral if this right were a mere executive right not subject to review in a prize court; it would be a denial of the belligerents' right, if it could be exercised only subject to a paramount and absolute right of neutrals to be free to carry on their trade without interference or inconvenience. This latter contention has already been negatived in the *Stigstad* (*supra*). The argument in favor of the former, drawn from the decisions of Sir William Scott, seems to their Lordships to be no less unacceptable.

With the terms of the proclamations and orders in council from 1806 to 1812 their Lordships are not now concerned. They were such that the decisions on them in many cases involved not merely the use of the term "blockade" but discussion of, or at least allusion to, the nature of that right. It is, however, in their opinion a mistake to argue, as has been argued before them, that in those decisions the right to condemn was deemed to arise from the fact that the cases were cases of blockade, although the occasion for the blockade was the passing of a retaliatory order. In their opinion Sir William Scott's doctrine consistently was that retaliation is a branch of the rights which the law of nations recognizes as belonging to belligerents, and that it is as much enforceable by courts of prize as is the right of blockade. They find no warrant or authority for holding that it

is only enforceable by them when it chances to be exercised under the form or the conditions of a valid blockade. When once it is established that the conduct of the enemy gave occasion for the exercise of the right of retaliation, the real question is whether the mode in which it has been exercised is such as to be invalid by reason of the burden which it imposes on neutrals, a question preëminently one of fact and of degree.

The onslaught on shipping generally, which the German Government announced and carried out at the beginning of 1917, is now a matter of history. Proof of its formidable character is to be found in a comparison between the Retaliation Orders in Council of 1915 and 1917, and their Lordships take the recitals of the latter order as sufficiently establishing the necessity for further invoking the right of retaliation. They address themselves accordingly to what is the real question in the present appeal—namely, the character and the degree of the danger and inconvenience to which the trade of neutrals was in fact subjected by the enforcement of that order. They do not think it necessary to criticize theoretic applications of the language of the order to distant seas, where the enemy had neither trade nor shipping, a criterion which was argued for, but which they deem inapplicable. Nor have they been unmindful of the fact that, to some extent, a retaliatory order visits on neutrals the consequences of others' wrongdoing, always disputed though in the present case hardly disputable, and that the other belligerent, in his turn and also under the name of retaliation, may impose upon them fresh restrictions, but it seems to them that these disadvantages are inherent in the nature of this established right, are unavoidable under a system which is a historic growth and not a theoretic model of perfection, and are relevant in truth only to the question of degree. Accordingly they have taken the facts as they affected the trade in which the *Leonora* was engaged, and they have sincerely endeavored to view those facts as they would have appeared to fair-minded and reasonable neutrals, and to dismiss the righteous indignation which might well become those who recall only the crises of a desperate and terrible struggle.

Compliance with the requirements of the Order in Council would have involved the *Leonora* in difficulties, partly of a commercial and partly of a military character. Her voyage, and with it the ordinary expenses of her voyage, would have been enlarged and the loss of

time and possibly the length of the voyage might have been added to by the fact that no port or class of ports of call had been appointed for the purpose of the order. Inconvenience of this character seems to be inevitable in the circumstances. So far as it is measurable entirely in terms of money, the extra expense is such as could be passed on to the parties liable to pay freight, and, neither by itself nor in other and more serious matters, should this kind of inconvenience be rated high.

The order does not forbid the carriage of the goods altogether. The neutral vessel may carry them at her peril, and that peril, so far as condemnation is concerned, may be averted if she calls at an appointed port. The shipowner no doubt would say that, if his ship is to make the call, he will never be able to ship the cargo, for its chance of escape would be but small, and that if he is to get the cargo he must risk his ship and undertake to proceed direct to her destination. This contention is less formidable than it appears to be on the surface. Their Lordships know well, and the late President with his experience knew incomparably better, with what ingenuity and artifice the origin of a cargo and every other damaging circumstance about it have been disguised and concealed, where the prize of success was high and the parties concerned were unfettered by scruples and inspired by no disinterested motives. They think that the chance of escape in a British port of call must be measured against the enormous economic advantage to the enemy of carrying on this export trade for the support of his foreign exchange and the benefit of his much-needed imports, and they are convinced that the chance might well be sufficient to induce the promoters of the trade both to pay, and, indeed, to prepay whatever freight the shipowner might require to cover extra insurance and the costs of a protracted voyage, and to give to the actual shipper such favorable terms of purchase, insurance or otherwise, as would lead him to expose his cargo to the risk of detection of its origin. They are far from thinking that compliance with the order would exclude neutrals from all the advantage of the trade. If the voyages were fewer they would tend to be more profitable singly, and in any case this particular traffic is but a very small part of the employment open, and legitimately so, to neutral traders, and the risk of its loss need not be regarded as of great moment.

There is also some evidence that Dutch municipal law forbade,

under heavy penalties, that such a deviation, as would be required by a call at a British port, should be made by a Dutch ship which had cleared for Sweden. If, however, the Order in Council is in other respects valid, their Lordships fail to see how the rights of his Majesty under it can be diminished or the authority of an international court can be curtailed by local rules, which forbid particular nationals to comply with the order. If the neutral is inconvenienced by such a conflict of duty, the cause lies in the prescriptions of his own country's law, and does not involve any invalidity in the order.

Further, it is pointed out that, with the exception of France, the other Allied Powers did not find it necessary to resort to a similar act of retaliation, and it is contended that, on a comparison with the Order of 1915 also, the consequences involved in a disregard of the Order of 1917 were of unnecessary severity and were unjustifiable. The first point appears to be covered by the rule that on a question of policy—and the question whether the time and occasion have arisen for resort to a further exercise of the right of retaliation is essentially a question of policy—a court of prize ought to accept as sufficient proof the public declarations of the responsible executive, but in any case the special maritime position of his Majesty in relation to that of his Allies affords abundant ground for refusing to regard a different course pursued by those Allies as a reason for invalidating the Order of 1917. If the second point involves the contention that a belligerent must retaliate on his enemy, so far as neutrals are concerned, only on the terms of compensating them for inconvenience, if any is suffered, and of making it worth their while to comply with an order, which they do not find to be advantageous to their particular interests, it is inconsistent with the whole theory on which the right of retaliation is exercised. The right of retaliation is a right of the belligerent, not a concession by the neutral. It is enjoyed by law and not on sufferance; and doubly so when, as in the present case, the outrageous conduct of the enemy might have been treated as acts of war by all mankind.

Accordingly, the most material question in this case is the degree of risk to which the deviation required would subject a neutral vessel which sought to comply with the order. It is said, and with truth, that the German plan was by mine and by submarine to deny the North Sea to trade; that the danger, prospective and actual, which that plan involved must be deemed to have been real and

great, or else the justification of the order itself would fail; and that the deviation which the *Leonora* must have undertaken would have involved crossing and recrossing the area of peril. Their Lordships recall and apply what was said in the *Stigstad* (*supra*), that in estimating the burden of the retaliation account must be taken of the gravity of the original offence which provoked it, and that it is material to consider not only the burden which the neutral is called upon to bear, but the peril from which, at the price of that burden, it may be expected that belligerent retaliation will deliver him. It may be—let us pray that it may be so—that an order of this severity may never be needed and, therefore, may never be justified again, for the right of retaliation is one to be sparingly exercised and to be strictly reviewed. Still, the facts must be faced. Can there be a doubt that the original provocation here was as grave as any recorded in history; that it menaced and outraged neutrals as well as belligerents; and that neutrals had no escape from the peril except by the successful and stringent employment of unusual measures or by an inglorious assent to the enslavement of their trade? Their Lordships have none.

On the evidence of attacks on vessels of all kinds and flags, hospital ships not excepted, which this record contains, it is plain that measures of retaliation and repression would be fully justified in the interest of the common good, even at the cost of very considerable risk and inconvenience to neutrals in particular cases. Such a conclusion having been established, their Lordships think that the burden of proof shifts, and that it was for the appellants to show, if they desired, that the risk and inconvenience were in fact excessive, for, the matter being one of degree, it is not reasonable to require that the Crown, having proved so much affirmatively, should further proceed to prove a negative and to show that the risk and inconvenience in any particular class of cases were not excessive. Much is made in the appellants' evidence of the fact that calling at a British port would have taken the *Leonora* across a German mine-field, but it is very noticeable that throughout the case the very numerous instances of losses by German action are cases of losses by the action of submarines and not by mines. The appellants filed a series of affidavits, stating in identical terms that in proceeding to a British port of call vessels would incur very great risk of attack by submarines, especially if unaccompanied by an armed escort. Of the possibility of obtain-



ing an armed escort or other similar protection they say nothing, apparently because they never had any intention of complying with the Order in Council, and therefore were not concerned to ascertain how much danger, or how little, their compliance would really involve. Proof of the amount of danger involved in crossing the mine-field in itself is singularly lacking, but the fact is plain that after a voyage of no extraordinary character the *Leonora* did reach Harwich in safety.

In these circumstances their Lordships see no sufficient reason why, on a question of fact, as this question is, they should differ from the considered conclusion of the President. He was satisfied that the Order in Council did not involve greater hazard or prejudice to the neutral trade than was commensurate with the gravity of the enemy outrages and the common need for their repression, and their Lordships are not minded to disturb his finding. The appeals accordingly fail. Their Lordships will humbly advise his Majesty that they should be dismissed with costs.

## BOOK REVIEWS

*Die Internationale Beschränkung der Rüstungen.* By Hans Wehberg.  
Stuttgart und Berlin Deutsche Verlags-Anstalt. 1919, pp.  
xii, 464.

THE appearance of an instructive volume on the International Limitation of Armaments by this distinguished representative of German scholarship is a good omen. To be sure, Dr. Wehberg has long been known as one of the few German authorities on international law of liberal or progressive tendencies, and it is to be hoped that under the new régime in Germany, scholars of his ilk will have a greater influence with the German public and in governmental circles than they have had in the past.

The Limitation of Armaments is appropriately dedicated by Dr. Wehberg to his friend Walter Schücking in "memory of ten years mutual pacifist activity." But though a work of thorough scholarship in the best German sense, this book can hardly be considered as important a contribution to the subject of which it treats or to the science of internationalism in general as certain of his former books, notably *Das Beuterecht im Land- und Seekriege*, 1909 (Capture in War on Land and Sea, translated by Robertson, London, 1911), *Das Problem eines internationalen Staatengerichtshofes* (The Problem of an International Court of Justice, Carnegie Endowment, Oxford, 1918, and *Das Seekriegsrecht*, 1915 (Handbuch des Völkerrechts, Bd. IV.).

In his preface the author sagely remarks that "anyone striving for the progress of law must not be satisfied to recommend for acceptance a series of legal precepts, but must also lay the psychological foundation for the new law. The more we jurists recognize the interrelation of international law with the problem of internationalism, politics, etc., the easier it is for us to evade the danger of setting up dead norms and the more do we contribute toward the enlargement

of the rule of the law of nations. Nothing hinders the completion of this field of law extending toward the future as much as this mutual suspicion between states engendered by armaments."

Dr. Wehberg explains further that his book is not a piece of propaganda, but a "scientific treatment of the problem in respect to its historical development in theory and practice and its valuation from a sociological and international law standpoint."

Considerably more than one-half of the work is devoted to matters "historical" under the general captions of "Efforts of Private Persons and Associations," "Efforts of Parliaments" and "Efforts of Governments." This part of the book invites no particular comment, inasmuch as most of the material is contained in English works readily accessible to students of the subject. There is of course a full treatment of the discussions on this subject at the Hague Conferences of 1899 and 1907, including a condemnation of Germany's policy at these conferences. There is a failure, however, to utilize the interesting revelations of Andrew D. White, as contained in his luminous Autobiography.

The most important part of Dr. Wehberg's new book seems to be the part headed "Grundsätzliches" (Matters Fundamental). But even in respect to this portion of the work the reviewer confesses to a certain sense of disappointment. The author apparently treads none but beaten paths and contributes little or nothing to the discussion that might be called new or "striking." He dwells upon the insecurity of armaments in general, the dependence of national armaments upon one another, the need for an international understanding on the subject, the now almost universally acknowledged insufficiency of mere judicial or arbitral methods, etc. He states and answers methodically the various objections of an ethical, economic, political or technical nature that may be urged against a policy of limitation of armaments. He also discusses the powerful influences exerted by the armament industries and the various plans suggested for a limitation of armaments, as also the means of international guarantee and control, devoting a brief concluding section to the "Limitation of Armaments at the End of the World War."

Among advocates of a limitation of armaments, Dr. Wehberg may be classed as moderate or liberal rather than radical. He justly emphasizes throughout his work the importance of the international point of view, the need of a world treaty on the subject, and insists

that limitation must not be deferred until the completion of a world organization.

Appended to this volume are a considerable number of interesting documents, such as resolutions of various peace conferences, the scheme of an international treaty presented by Dr. Quidde, and the plans contained in various schemes for a League or Confederacy of Nations. It may be added that Dr. Wehberg's book will prove a valuable work of reference to German publications on the subject of which it treats.

AMOS S. HERSHEY.

*The Society of Nations.* By T. J. Lawrence. New York: Oxford University Press. 1919. pp. xi, 194. \$1.50 net.

This volume presents in book form the substance of six lectures given by the distinguished author in the autumn of 1917 at the University of Bristol. Although delivered when the great war was at its height, their purpose was to give to laymen sufficient understanding of the history of international relations to enable them to form reasonable convictions as to the possibility of developing, after the war, a society of states within which civilization might continue to progress, together with a knowledge of the best lines of advance towards this end. The first three lectures sketch in broad lines the upbuilding of international society and the law of nations, from the earliest times to the outbreak of the great war. The absence of any general obligation to enforce accepted rules, the scientific arming of the nations, and the German doctrine of *Kriegsraison* are set forth as the fatal weaknesses of the system. The fourth lecture is a picture, done in war-time colors, of the acts and the policies by which Germany partially destroyed the existing structure of international law. The blows struck at good faith and the obligation of treaties by the violation of Belgium, at humanity and the obligation of law by German "frightfulness," and at neutral rights by the widespread application of the doctrine of reprisals are declared to have reduced to ruins the law of war and the law of neutrality. The law of jurisdiction and the law of diplomacy, on the other hand, still stand untouched.

In lectures five and six, which have been entirely rewritten, are set forth the conditions of reconstruction, and the author's plan for

the rebuilding of international society. The development of a recognized and enforceable code of international law is declared to have been rendered imperative by the conditions under which modern wars are fought, and the conscious organization of the world for peace rather than for war, together with a general recognition by all civilized states of a positive duty to enforce the law, are emphasized as the necessary steps to reform. In the light of subsequent proceedings in Paris, Lawrence's suggestions as to procedure, and his scheme for world organization, are of interest. At the time he wrote he would have had the Peace Conference decide upon the general principles of the new world order, and then appoint one international committee to work out the details and another to revise and codify international law. Both would report to a great international congress, and in the meantime an authority would be created for deciding disputes which could not be settled by diplomacy.

A League of Nations possessing certain definite characteristics is his solution of the problem of world organization. "There are four needs," he writes, "the satisfaction of which civilized mankind should insist upon in any scheme for the creation of a new and better international order whether by means of a league of nations or in some other way. They are, first, the provision of Arbitral Courts to deal with cases susceptible of judicial treatment; secondly, the establishment of conciliation committees for the settlement of cases not capable of judicial treatment; thirdly, the organization of an international force to be used in the last resort for the purpose of compelling recalcitrant states to submit to the decisions of these tribunals and committees; and fourthly, the proportional and simultaneous disarmament of all civilized Powers, saving only the forces necessary to safeguard the social fabric."

It is to be noted also that he would reserve for the "Great World-Powers" a position "of advantage" upon the conciliation committee, or committees, otherwise, "we cannot be sure that predominant force would always be available to support, if necessary, the decisions arrived at. Yet unless this union of irresistible force with impartial justice can be established and maintained, the new order will break down, like the old, in a welter of bloodshed and misery."

Finally, the author recognizes that no constitutional machinery will accomplish much of itself, and places the ultimate hope of mankind upon the development of an international moral and spiritual

brotherhood. The Church and the Labor Movement are seen as the great forces which may effect such a development, as, "the union of the two in a demand for a League of Nations would make it irresistible, and at the same time purify it from all ignoble elements." These lectures are admirably adapted to accomplish their purpose, and it is fortunate that they have been made available for an audience far greater than that for which they were originally prepared.

RALSTON HAYDEN.

*Les Alliés et les Neutres* (Août 1914—Décembre 1916). By Ernest Lémonon. Paris: Librairie Delagrave. 1917. Deuxième édition, pp. xi, 335. Price 3 fr. 50c.

The contents of this work, whose interest properly attaches to those days of 1915 and 1916, now historic, when all minds were engrossed in the varying vicissitudes of war, fall into two rather loosely connected sections. In the first of these, after an interesting chapter dealing with the repercussion of the war upon the political disunion of the several Entente Powers in 1914 and the resultant development, internally, of a recrudescence of national unity and, externally, of the "union sacrée," there follows an account, illuminated by statistics, of the extraordinary military, financial, and industrial "efforts" which the Allies found it necessary to put forth in order to meet their enemies upon tolerably equal terms. A final chapter summarily outlines the immediate diplomatic origins of the war.

The second and more extended portion of the work consists in substance of monthly reviews of foreign affairs contributed by the author to the *Revue Politique et Parlementaire* during the period from May, 1915, to December, 1916. In effect, the official and, more especially, the popular attitude of the various European neutral countries and of the United States is described from the point of view of a belligerent critic, who, though apparently not entirely willing to exculpate neutral states for their attitude of indifference in the face of Teutonic criminality, nevertheless, attempts impartially to gauge the extent to which neutral opinion was at the time favorable to the Entente. As might be anticipated, the three crucial developments in the Balkans—the perfidious duplicity of Bulgaria, the vacillations and reticent

intervention of Roumania, the tortuous episodes in the Greek imbroglio—claim first and most adequate treatment. The ensuing chapter upon the neutral policies of the United States betrays, it is to be feared, a too transparent animus which may perhaps be traced to the unfortunate effect of President Wilson's peace suggestions of December, 1916, upon Entente opinion. Less complete though more considerate attention is given to Holland, Switzerland, Sweden, Denmark, and Spain.

A work admittedly fugitive and incomplete as is this, scarcely calls for extended criticism. One or two remarks may, however, be appended. Obviously, the author could not take advantage of the light which subsequent events, such as the revelations from revolutionary Russia, have thrown upon the period with which he deals. Nor can the reviewer, who is possibly too little sympathetic with the realism of European diplomacy, wholly agree with the reiterated criticism which the writer levels against the policy of the Entente Powers in their dealings with neutrals—namely, their overscrupulous hesitancy in resorting to the "*manière forte*." As if neutrals were on all occasions solely dominated by fear. In fact, it may appear, when the scroll of history is unfurled, that it was a relative consideration for the feelings, if not always the rights, of neutrals, that chiefly distinguished the diplomacy of the Entente from that of its opponents and thereby contributed to its ultimate success. Certainly, the policy of the White House, too subtle perhaps for a European critic to appreciate in the midst of a desperate conflict, could not be fairly interpreted, as Mr. Lémonon appears to believe, by reference to an all-pervasive fear of German aggression.

HESSEL EDWARD YNTEMA.

*James Madison's Notes of Debates in the Federal Convention of 1787 and their Relation to a More Perfect Society of Nations.*

By James Brown Scott. New York: Oxford University Press, American Branch. 1918, pp. xvii, 149. \$2.00.

This book belongs to the recent flood of literature, of one sort or another, regarding the formation of a League of Nations. Its purpose is to present (and especially to foreign readers), the Constitution of the United States as a prototype of such a league, springing

from an assembly of sovereigns which assumed to plan for their interdependence as members of an international organization, without destroying their independence, as regards each other.

The United States was reconstituted in 1789 by the act of the people in the several states. This made it a nation for some purposes, but not for all. It subjected the component States to certain modes of judicial control. It deliberately abandoned the English principle that an Act of Parliament was the supreme law of the land. Mr. Justice Willes is quoted (p. 63) as saying of that:

We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by Parliament, with the consent of the Queen, Lords and Commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it; but so long as it exists as law, the Courts are bound to obey it. The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them.

On the other hand, the American principle of the supremacy of law and of the courts in declaring it, the author regards as clearly applicable to a confederation of nations. "All nations," he adds, "do not need to agree to form an international tribunal, for the American plan of a more perfect union was to go into effect when nine of the States should ratify the Constitution, and it is fundamental to bear in mind that by the express language of the Constitution only those States were to be bound which did so ratify it. Nor is it necessary, on the other hand, that the nations form themselves into a Union of States for all, or even for general purposes, as States united for judicial settlement will suffice for justiciable purposes. They merely need to agree by treaty, convention, compact, call it what you will, to submit their disputes, heretofore unsettled by their diplomatic agents, to a court of their own creation, and therefore their agent for this purpose" (pp. 70, 71).

As the Philadelphia Convention undertook to arrange a union, which might contain all the thirteen States and yet might only embrace nine, so (p. 80)

If the nations only will, they may make a union of any of their number for judicial settlement, and that by simply a treaty, convention, compact or agreement, creating the court, granting it jurisdiction, defining its procedure, to be set in motion by the plaintiff, leaving the execution of judgment, as in the case of an arbitral award or of a decision of our Supreme Court, to the good



faith of the contracting parties, and it is done. The example of the American States shows the way to do it. The procedure of the court of the several States shows the feasibility of doing it. The agony of Europe shows that it must be done if the blood and treasure of the future are to be saved from the catastrophes of the past.

The Permanent Court of Arbitration set up by the Hague Conventions of 1899 and 1907 is regarded as (p. 82) "a first step to a judiciary of the Society of Nations 'accessible to all, in the midst of the independent Powers.'"

Probably the most useful part of the book to American readers is that in which attention is called to the two main features as to which the procedure of the Philadelphia Convention differed from that at most international conferences, since held, namely, that

Nominations were to be made and decided by ballot, not by a silence that is held to betoken assent, and that resolutions or proposals were to be adopted by a majority instead of by the unanimous vote of all the States. But it is not unreasonable to believe that future international conferences may, both as to election by ballot and to adoption by majority, profit by the experience of the Federal Convention, which is to date the only international conference whose labors have stood the test of time and of criticism. This seems probable because self-respecting States cannot be expected to have the larger States organize the conference by prearrangement without consulting the delegates of the less powerful nations, and because it may prove undesirable to continue the unanimity rule when no State is bound by its vote in conference or even by the vote of the conference except as the State signifies its own ratification after formal submission of the project for separate approval or disapproval (p. 23).

These points have become of high importance to the world, in view of the procedure at the loosely gathered Peace Conference of 1919 at Paris and Versailles. Unanimity in the gravest matters has been assumed to exist, on the principles that *Qui tacet consentire videtur*.

There is a colloquialism and freedom of epithet in this treatise that jars one's sense of style, but lends a certain freshness and vivacity to the historical narrative. Thus it is said that the Maryland and Virginia delegates to the Alexandria Conference of 1785 were "artfully entertained" by Washington at Mount Vernon; Rhode Island is described as a "pigmy commonwealth"; the Federal Convention is spoken of as revising the Articles of Confederation "with a vengeance by throwing them overboard"; and Madison is styled "the little man of Montpelier."

The preface is dated November 11, 1918, the day of the opening of the armistice, and nothing which has occurred since then is made the subject of consideration.

SIMEON E. BALDWIN.

*Modern Japan.* By Amos S. Hershey and Susanne W. Hershey. Indianapolis: The Bobbs-Merrill Company. 1919, pp. 382.

In defining the means through which the cause of peace among nations may be promoted, the foremost private organization devoted to the serious study of the subject enumerates among its objects "to increase the knowledge and understanding of each other by the several nations."<sup>1</sup> *Modern Japan* is in no sense a pacifist publication; but it has an unquestionable claim for a prominent place in the literature designed to increase the knowledge of Japan by the United States, and the Japanese will find in it friendly criticisms upon points of possible friction between the two nations.

The greater part of the volume is naturally devoted to a discussion of social, industrial and political conditions within Japan. To one not already familiar with those conditions, these pages contain a great deal that is of interest, much that is surprising and some things that are disappointing. But the authors have warned the reader in advance:

When this fascinating and artistic people showed itself eager to learn the secrets of modern civilization and exhibited a marvelous facility for acquiring and adopting Western ideas and machinery, is it surprising that their teachers should have sung the praises of their apt pupils and heralded to the world a somewhat exaggerated idea of their progress and capability? (p. 1.)

Of special interest to the readers of the JOURNAL are the last 125 pages dealing with Japan's modern international relations. Beginning with the acquisition of the Loochoo Islands in 1874, Japan's expansion is traced in Korea, Manchuria and China. The expansionist policy followed closely the introduction of military service in 1872, and the militaristic tendency has developed to the point where the authors state:

With the Japanese, as with the Germans, war is an instrument of policy—a justifiable method of attaining positive ends such as commercial greatness,

<sup>1</sup> Proposed Charter of the Carnegie Endowment for International Peace, Year Book, 1919.

national prestige and territorial increase. If to this psychological quality and militaristic teaching and training there is added the existence of a powerful military caste or clique, the possession of great military power, and a Hegelian philosophy of the state, the analogy with Prussia becomes very striking (p. 254 n.).

The similarity between the Japanese and German ideas of foreign policy is illustrated in a quotation on page 259 from the Secret Memoirs of Count Hayashi. Apparently not content that Japan should remain the land of the rising sun, the Count aspired for his country, if not the proud position of her great Western ally upon whose flag the sun never sets, at least a place in the risen sun. Commenting on the forced retrocession of the Liao-tung Peninsula after the Chino-Japanese War of 1894-95, Count Hayashi wrote:

What Japan has now to do is to keep perfectly quiet, to lull the suspicions that have arisen against her, and to wait, meanwhile strengthening the foundations of her national power, watching and waiting for the opportunity which must one day surely come in the Orient. When that day arrives she will be able to follow her own course, not only able to put meddling Powers in their places, but even, as necessity arises, meddling with the affairs of other Powers. Then truly she will be able to reap advantages for herself (p. 259).

In a chapter (XVI) on Japanese aims and policy in China, the authors give a documentary narrative of the conquest of Kiao-chow by Japan and the subsequent negotiations with China on the subject. The timeliness of this subject in connection with the discussion of the treaty of peace with Germany justifies more than passing notice. The ultimatum which Japan delivered to Germany on August 15, 1914, demanded the delivery of the entire leased territory of Kiao-chow "with a view to the eventual restoration of the same to China." Nine days later, in a "message to the American people," cabled to the New York *Independent*, Count Okuma gave the following assurance:

As Premier of Japan, I have stated and now again state to the people of America and the world that Japan has no ulterior motive, no desire to secure more territory, no thought of depriving China or other peoples of anything which they now possess.

My Government and my people have given their word and their pledge, which will be as honorably kept as Japan always keeps her promises (p. 298).

But less than a year later, in the ultimatum to China of May 7, 1915, containing the so-called twenty-one demands, the Japanese Govern-

ment declared: "The Imperial Japanese Government, in taking Kiao-chou, made immense sacrifices in blood and money. Therefore after taking the place, there is not the least obligation . . . to return the place to China" (p. 300).

In the series of agreements signed on May 25, 1915, which were imposed upon China as the result of this ultimatum, Japan attached important conditions to the restoration of Kiao-chou to China, including an exclusive Japanese concession at a place to be designated by the Japanese Government, and the previous negotiation of a mutually satisfactory agreement "as regards the disposal to be made of the buildings and properties of Germany and the conditions and procedure relating thereto" (p. 313).

Professor Hershey believes that "Kiao-chou may, indeed, be 'restored,' but it will be under such conditions as to leave Japan virtually predominant in Shantung"; and this incident leads the authors to add:

For sincere lovers of the Japanese like the authors of this volume it becomes a very painful duty to have to record their impression that the Japanese Government must experience a considerable change of heart and method before implicit confidence can be placed in its pledges and assurances. It is greatly to be deplored that in the field of diplomacy Japan has preferred to imitate Russia and Germany rather than the countries of Western Europe and America (p. 298, note).

In answer to the Japanese justification of her treatment of China by speaking of a "Monroe Doctrine for Asia," our authors reply that:

The analogy of Japan's policy in Asia with the Monroe Doctrine has some striking aspects, but is very misleading and imperfect. In so far as Japan desires to prevent further European political aggression in Eastern Asia or to remove a political menace like that of Germany in possession of Tsing-tau, Americans are able to sympathize with Japan's attitude. But in so far as the Monroe Doctrine for Asia includes aims of political aggression, exclusive or monopolistic concessions, a privileged position for purposes of commercial or industrial exploitation, the analogy fails. The United States makes no such claims on the American Continent (p. 316).

In a chapter on Japan and the United States (XVII), the authors discuss the negotiations over the San Francisco school question, the immigration problem and the California land laws and reach the conclusion that "The first condition for a future good understanding

between the two countries is a realization of the fact in Japan that, so far as lies within our power, the doors of the United States are practically closed to all Oriental races" (p. 335). And, after discussing the possibilities of war between Japan and the United States, (Chapter XVIII), Professor Hershey states:

The assumption frequently made in certain circles that the difficulties between the two countries are due to mutual ignorance and misunderstanding and can be removed by campaigns of education contains a measure of truth, but something more is needed than handshakings accompanied by mutual felicitations and an exchange of compliments or expressions of good-will. A mutual effort must be made to understand the issues involved, together with the point of view of each nation regarding them.

The Japanese must be taught to understand that the race and immigration issues on the Pacific coast constitute an American economic problem which can be solved in only one way—by the virtual exclusion of the Oriental laborers. In the execution of this policy as much consideration as possible should be shown for Japanese (and Chinese) susceptibilities.

Irritating, unjust and unnecessary laws like the Webb Act should be avoided, and our federal naturalization act might be revised so as to render it non-discriminatory. But on the main point the Japanese must be made to understand that no compromise is possible (p. 345).

Among recent developments in the international relations of Japan, treated in the concluding chapter of the book, the Lansing-Ishii agreement is stated by the authors to mark a decisive crisis in Japan's Far Eastern diplomacy. She has the choice of following the older diplomacy, which regarded China as "a happy hunting ground for concession hunters, loan syndicates and traders of various nationalities," or the newer diplomacy represented by the American policy of the open door which constitute a "sort of Magna Charta for freedom of trade in China and the preservation of Chinese independence."

Professor Hershey concludes that:

Japan has truly reached the parting of the ways in her Far Eastern policy. Her conduct in China and consequently her relations with the United States are bound to become better or worse. Either she will revert to her old aims and methods learned in an evil school and taught by bad European examples, or she will whole-heartedly and unreservedly adopt the aims and methods of the newer diplomacy as advocated and practised by the United States. In the latter event, China will probably be saved, and the United States, recognizing the "special position" of Japan in the contiguous and adjacent provinces, will only be too glad to coöperate with Japan and other nations in the guidance and industrial development of the Chinese Empire.

It is to be hoped that the terrible lessons of the last five years will not fail to make their proper impress upon the choice of the road in foreign policy, which Japan will decide to follow.

GEO. A. FINCH.

*Cuestiones Internacionales: Bolivia-Paraguay.* By Américo del Val (E. Diez de Medina). La Paz: Imprenta Nacional. 1918, pp. 83.

*Bolivia-Chile: Cuestiones de Actualidad.* By E. Diez de Medina. La Paz: Arnó Hermanos. 1919, pp. vi, 154.

The first of these two interesting pamphlets is a reproduction of a series of articles published by Señor Diez de Medina under the pen name of Américo del Val, in the newspaper *El Norte* of La Paz, in answer to another series of articles published by Dr. Cecilio Baez, Minister of Paraguay to France, England, Italy, and Spain, upon the mooted question of boundaries between Bolivia and Paraguay.

The subject-matter of this boundary controversy between Bolivia and Paraguay is a piece of territory situated between the western bank of the River Paraguay, from the north boundary of the Brazilian possessions of Bahía Negra to the left bank of the Pilcomayo River, which flows out across Asunción, the capital city of Paraguay. This boundary dispute has indeed been the subject of many extended discussions among the most distinguished writers and statesmen of Bolivia and Paraguay, and is, perhaps, today, the most important and best known boundary dispute of Latin America, both on account of the extent of the territory in controversy and the length of time over which this controversy has extended.

While it is not our present purpose to join in this famous dispute, and much less to show any partiality in the same, or, still less, to pass judgment on the ultimate question of who is right and who is wrong, we cannot refrain from admiring the clear statement of the Bolivian case by Señor Diez de Medina and heartily congratulate him upon his patriotic and scholarly efforts.

The other pamphlet contains three valuable essays on international politics, which it must be admitted are not lacking in importance and interest. The first deals with what the author calls the fundamental rights of Bolivia. Among these rights he cites those of *self-preservation, independence, and international communication.*

"A treaty," he says, "which is based upon conquest and sets a limitation to the fundamental rights of a state, cannot be eternal, nor perpetually binding. . . . The modern doctrine establishes that, *in principle*, a state cannot relinquish such permanent rights as constitute the foundation of its own independence: thus treaties which entail a violation of such rights can have no validity, nor even an obligatory character. *In practice* the value of such treaties has just been shown by the undoing of the cession of Alsace-Lorraine forced upon France by Germany by the Treaty of Versailles of 1871."

The next essay relates to the war of 1879 between Bolivia and Chile, which brought about the *enclosure* of the former within land boundaries and excluded her from the sea. In this essay the author reviews the causes and responsibilities of that war, giving us a clear conception not only of the Bolivian point of view on this question, but also on the ethical aspects of the same from an international point of view.

In the last essay, which refers to the Toco question, the author reveals himself, as Señor C. Rojas says in the introductory note to this pamphlet, to be a diplomatist who has been officially engaged in obtaining the recognition of private rights in the territories transferred to Chile.

PEDRO CAPÓ RODRÍGUEZ.

*Notes on the Diplomatic History of the Jewish Question.* With texts of treaty stipulations and other official documents. By Lucien Wolf. London: Spottiswoode, Ballantyne & Company, Ltd. 1919. Printed for the Jewish Historical Society of England. pp. x, 133.

*Jewish Rights at the Congresses of Vienna (1814-1815) and Aix-La-Chapelle (1818).* By Max J. Kohler. New York: American Jewish Committee. 1918. pp. v, 109.

The conception of the Jew as a subject in international relations is a somewhat novel one to the Gentile, even if he may be generally well-informed concerning the history of international law. The Jewish publicists who have produced these two monographs have not only justified their scholarship in the task, but have shown themselves in what is apparently a minority of one among international-

istic pleaders of the present: they have not concluded that the world will be committing the crime of centuries if it does not forthwith recognize their particular nationality as a sovereign state. It is therefore the more pleasant to review their works as contributions to the history of international relations.

Mr. Wolf's book is a general view of the whole subject of the diplomatic history of the Jewish question, done in the summary form of short historical statements, supplemented by appropriate documents, several of which are published for the first time. Mr. Kohler's book puts the publicists' microscope on two incidents of that whole history.

"The Jewish question is part of the general question of religious toleration," says Mr. Wolf. With the exception of isolated incidents running as far back as 1498, it first came to public attention in England during the Commonwealth as a national policy. In 1744-45 an interesting intervention in behalf of the Jews of Bohemia was made by the English Government, with the result that a decree banishing many thousands of Jews was revoked and that they were permitted to return to their homes.

The Congress of Vienna in 1815 was the scene of the next appearance of the Jewish question. Its consideration there, says Mr. Kohler, "proved of considerable importance in the history of Jewish emancipation, though the narrative of the subject has been very much neglected." France, under Napoleon, had provided for an effective scheme for Jewish emancipation in the Kingdom of Westphalia; and Prussia in 1812, and Bavaria in 1813, had voluntarily followed the French precedent. Frankfort and the Hanseatic cities, on the other hand, were unsympathetic with Jewish toleration, either as a free gift or by purchase. At the Congress of Vienna, Prince Metternich for Austria, Friedrich von Gentz and Wilhelm von Humboldt were the principal proponents of Jewish rights among the negotiators. The Jews of Frankfort, Bremen, Hamburg, and Lübeck were represented by delegations at the Congress and were in constant correspondence and contact with the delegates mentioned. These men considered that the Napoleonic reforms had left the condition of the Jew in non-Germanic Europe in a satisfactory condition and they tackled the problem of securing civil rights within Germany. The measure of their success is found in Article 16 of the Confederative Constitution of Germany, which is Annex 9 of the Final Act of Vienna:



The difference of the Christian confessions in the countries and territories of the Germanic Confederation shall not entail any prejudice in the enjoyment of civil and political rights.

The Diet shall take into consideration the means of effecting, in the most uniform manner, the amelioration of the civil state of those who profess the Jewish faith in Germany and shall pay particular attention to the measures by which the enjoyment of civil rights shall be assured and guaranteed to them in the states of the Confederation, on condition that they submit to all the obligations of the other citizens. Meantime, the rights already accorded members of this religion by any particular state shall be secured to them.

The last sentence of this provision in its final form was a changing successfully substituted at the last moment by Senator Smidt, of Bremen. Frankfort and the Hanseatic States at the time were, respecting the treatment of Jews, still under the French law. The last sentence of the article quoted originally related to "the privileges already accorded members of this religion in any particular state," it being the intention to make permanent all gains of the Jews under the existent French laws. But just before the signing of the Constitution of the Germanic Confederation on June 8, 1815, ostensibly as a matter of editing, the "in" was changed to "by," so that the provision as officially adopted guaranteed the Jews only the rights accorded them by the states themselves. The Jews of Frankfort particularly suffered from this circumstance.

The Congress of Aix-La-Chapelle in 1818 had the Jewish question brought before it as a result of the memorial by the Rev. Lewis Way of Stanstead, England, who curiously enough had assumed as his object in life the conversion of the Jews to Christianity. Way presented to that Congress, which also had before it a scheme of the Tsar Alexander for Jewish emancipation, a memorial in which the Prussian statesman, Christian Wilhelm Dohm, also collaborated. Conditions at Frankfort were left untouched by the Congress, which in the protocol of November 21, 1818, declared sympathy "for the praiseworthy object" of the Tsar's proposals, and declared that the Jewish question was a matter which should "equally occupy the statesman and the friend of humanity."

There is little question, that this accomplishment of the protagonists of Jewish rights created, in the early days of the nineteenth century, a psychology of humanitarian interest in international relations which has since redounded very greatly to the advantage of other oppressed nationalities. For this reason the exceptional full-

ness of Mr. Kohler's work respecting Vienna and Aix-La-Chapelle is enlightening. With a careful scholarship he follows through to the final decision all the projects relating to his subject which came before the gatherings, recounts in detail the social and political influence of Jewish individuals upon members of the conference, and takes pains to detail the personal relations of the principal delegates to Jewish personalities. Humoldt, for instance, is presented as having been in a measure educated by a Jewess, whose home at Berlin was a haven for a brilliant circle of literary tendencies. In fact, all through Mr. Kohler's restricted study the workmanship is exceptionally detailed and comprehensive. His device of combining his index and bibliography is one that I do not recall to have seen elsewhere.

The next appearance of the Jewish question, as Mr. Wolf points out in his narrative, was at the conference of London respecting Greece in 1830. The Powers found themselves under the political necessity of insuring in Greece rights to Roman Catholics, in deference to Europe, and to Mohammedans, in deference to Turkey. The Jew benefited by a provision, which then amounted to a servitude, in the protocol of February 3, 1830:

That all the subjects of the new state, whatever may be their religion, shall be admissible to all public employment, functions, and honors, and be treated on the footing of a perfect equality, without regard to difference of creed, in all their relations, religious, civil, or political.

At the Congress of Paris of 1856, the London Jewish Board of Deputies appeared first as an active element in the struggle for Jewish rights. A Turkish Hatti-Humayoun of February 15, 1856, granted full civil rights to all non-Mussulman subjects of Turkey. The treaty of Paris of March 30, 1856, confirms the decree in Article IX, and this was made more definite by Article XLVI of the Paris convention of August 10, 1858. It is well-known that when Turkey was still further divested of opportunities for misgovernment by the Congress of Berlin in 1878, Jewish and other religious rights were guaranteed not only in Bulgaria, Rumania, Serbia, Bosnia and Herzegovina, but also in European and Asiatic Turkey.

The fact that Rumania has never lived up to the engagement taken at that time is notorius. Mr. Wolf shows how, by a constitutional provision, the Bucharest Government succeeded in divesting

native Jews of civil rights by failing to consider them as Rumanians *per se*, and then making naturalization to depend upon the relinquishment of a foreign protection. Secretary Hay's note of July 17, 1902, laying bare the injustice of Rumania's anti-Semitism, is highly praised by the author and reprinted textually. That the American note narrowly missed becoming the basis of an international protest is perhaps not so well-known as the circumstance of the document itself.

• The Conference of 1912-13 closing the Balkan Wars brought forward the London Jewish Conjoint Committee as the principal champion of racial rights. Its work was highly statesmanlike, and at the outbreak of the war it had secured a substantial assurance that territorial changes in the Near East would be ratified by the Powers only on condition of the protection of Jews and other members of minorities.

So much of Mr. Wolf's book is considered by him as instances of intervention on grounds of humanity. He next considers intervention by right under treaty, and cites a very interesting incident in 1815, when Turkey successfully claimed rights for her Jewish subjects resident in Austria, by virtue of the Treaty of Carlowitz of 1699. Between 1827 and 1855, Switzerland showed a distinct desire to discriminate against the Jew in her treaties. Mr. Wolf contrasts in favor of the action of the United States the negotiations respecting Jewish rights conducted by America and England under our Treaty of 1832 and the Anglo-Russian Treaty of 1859, respectively. It will be recalled that the resolution of the House of Representatives of December 13, 1911, called for the abrogation of the American Treaty because of Russian discrimination against American Jews.

The consular protection of Jews as Jews in Morocco by England, and the establishment of a system of such protection internationally by the Conference of Madrid of 1880, confirmed by that of Algeciras of 1906, adds an interesting feature to the study.

The Palestine question and the restoration of the Jews forms a section of Mr. Wolf's monograph. He finds that the Jews themselves were notably cold to the proposition from the time of its first seeing the light in 1621 until the arising of the Zionist movement twenty years ago. Col. Charles H. Churchill, then British consul in Syria, drew up such a project in 1841, to which the London Jewish Board of Deputies did not respond. About that time there were several

similar official propositions, but the idea of Palestine for the Jews did not really make headway until it was taken up by Herzl two decades ago. It is now apparently in process of realization, a number of the Allied and Associated Powers having officially expressed themselves as favorable to it.

DENYS P. MYERS.

*Transactions of the Grotius Society. Problems of the War. Vol. IV. Papers read before the Society in the year 1918. With an Appendix (The Freedom of the Scheldt). London: Sweet & Maxwell. pp. lvi, 295. Price to non-members, ten shillings net.*

The fourth of a series of practical studies of problems of international law in its relation to the World War, these papers were read at different meetings held by the Grotius Society during the year 1918. Prepared by men who know what they are writing about and are doing a kind of thinking that is worthy of serious scholars, this whole series of studies is a substantial contribution to the international law of the present day. It serves as much as any literature can serve to bring up to date treatises that were printed after the Second Hague Conference and before the beginning of the war. Although by no means technical in their literary style, these papers might prove to be too solid reading for the average layman; but they should be highly prized by college instructors, publicists; or legal advisers, who are more or less familiar with the topics treated and have occasion to refer to the latest discussions of them in authoritative form. Published for the advancement of truth, taking into consideration the welfare of humanity, pointing the way to rational international conduct, and showing a conscientious respect for international law, with no attempt to impose upon others a particular set of views, but full of suggestions for the reform of the laws of war and peace made in the general interest of the family of nations, the Grotius papers have a commendable scientific spirit.

Lord Parmoor, in an address on "The League of Nations," spoke before the Covenant of the League of Nations was drawn up at Paris, but that document is likely to be one of the chief topics in the report of the proceedings of the year 1919. He recognized, however, that the idea of the League is a feature of the intervention of America in the war and approved the platform of the League to Enforce Peace,

which is in some respects reproduced in the Covenant. Without going into detail, he expressed preference for judicial settlement of international disputes by a permanent court composed of the highest available jurists, rather than specially created arbitral tribunals for the determination of particular controversies, which was advocated in the United States before the agitation for the League of Nations in its present form began.

In the "Sequestration of Merchantmen," Dr. W. R. Bisschop supports in a short paper a timely article by Dr. K. Jansma, of Amsterdam, who, writing on "How to Avoid Destruction of Neutral Merchantmen," proposes that the "destruction of neutral prizes should be replaced by a guaranteed and generally recognized sequestration in a neutral port until the conclusion of the war."

In "The Highways of the Sea," Sanford D. Cole, with recognition of the proposals of President Wilson, Professor Van Vollenhoven, and Dr. Schueking, argues that the system of international government that has been set up already by various conventions should, by the coöperation of the Great Powers, be further extended to include a strong executive branch by the absorption of means of coercion now sometimes used for destructive purposes by individual nations, and that international police thus acquired should be used for the common protection. Part of the duty of this internationalized force should be to regulate intercourse over the highways of the sea, keeping it free and open at all times and under all circumstances in the interest of all nations. This course of action would mean that John Bull would have to stop singing "Rule Britannia," but the writer would be disposed to sacrifice some national advantage for the sake of the world at large.

A paper by F. W. Hirst on "What the Americans Mean by Freedom of the Seas," although brief, is historical and comes up in chronological paragraphs to the end of the Second Hague Conference, with mention of the attitude of the United States Government on the treatment of neutral mails, merchandise, and ships at the outbreak of the war. True, immunity from capture of private property at sea, except contraband, in time of war, has been advocated by statesmen as well as by propagandists of peace in this country, and has generally been opposed by the British Government and by those who profess to guard the maritime interests of Great Britain; but if, in the future, war is to be conducted not merely by armies and

navies, but by whole peoples against whole peoples, blotting out the distinction made by Rousseau, as in the case of the recent European conflict, it is doubtful whether the United States can with good sense maintain its traditional attitude on this question.

This whole topic, as well as that of the treatment of private property on land, is elucidated in a concise way, but with an insight into fundamental principles by Sir Graham Bower in a paper entitled "The Nation in Arms—Combatants and Non-Combatants." After showing that from the French Revolution, instead of leaving the waging of war to professional soldiers, we returned to barbarism under the régime of militarism, with its universal conscription and its methods of frightfulness, in Napoleonic times adopted and lately carried to excess by the Germans. Sir Graham, recognizing that the limitations on warfare laid down by the Hague Conventions were disregarded, pleads for a newly affirmed distinction between combatants and non-combatants both on sea and land. Realizing that submarines have changed the nature of cruiser warfare, and noting that they have caused the death of 15,000 merchantmen, non-combatants, he proposes measures to forbid the destruction of merchant ships, to prohibit absolutely their armament even for defensive purposes, and to grant the right of asylum in neutral ports to prizes manned by prize crews; but he would not thereby have invalidated the right of recapture on the high seas outside neutral territorial waters.

In close connection with the foregoing paper should be read an able and comprehensive study of "The Future Law of Neutrality," by George Grenville Phillimore. He explains the apparently illegal departure of Great Britain from the customs of the past, in respect to measures taken by her against neutral trade, as a temporary policy based on the principle of retaliation, or "the application of force to meet the enemy's system of force, and his departure from international law." Neutrals, he thinks, should be prepared to have their commercial freedom limited by the "rationing" system, by the extension of the right of angary or its equivalent, and by the principle of retaliation in case one of the belligerents commits a breach of international law. He favors the establishment of prize tribunals independently of the executive branches of governments and recommends that an International Prize Court of Appeal be set up such as was agreed upon at The Hague in 1907. But one might observe that

until we know whether the League of Nations Covenant is to go into effect, and is tested in war, we are uncertain whether there will be any neutrality hereafter, unless it be among pacifically inclined states that are either outcast or withdrawn from the League and not obligated to fight to protect its covenants; so that one hardly knows whether to encourage a revival of the Hague Conventions or to fall in with the prevailing fashion and forget them.

• "The Treaty-making Power of the Crown," by Judge Atherley-Jones, is in line with the modern movement for popular control of foreign policies, and is suggestive to one who has followed the discussion of the treaty-making power under the Constitution of the United States by Dr. David Jayne Hill. Dr. W. Evans Darby, authority on plans for world government, deals historically with "Some Schemes for a League of Nations," and shows that, among the lesser known of these, a plan by a German thinker, Karl Christian Friedrich Krause, for a European League of States, published in 1814, deserves examination, as it is more closely related to the present discussion than previous schemes. Dr. Darby thinks that the present situation of the rights of nationalities which have been established and enforced by the results of the war, portends a new world; but is of opinion that peace cannot be enforced, and that it would be a mistake to attempt to enforce it by alliance, reintroducing the idea "under the ægis of the enfranchised nationalities." Referring to the *Westminster Gazette*, he says it is not merely a change of label that is required.

In "Divergences Between British and Other Views on International Law," by Georges Kaeckenbeeck, there is a topical study of the differences in viewpoints by Great Britain, France, and Germany that one may have long desired to read, but did not know just where to find. "The Freedom of the Scheldt" is dealt with in a clever historical paper by Maître Albert Maeterlinck, to whose views several leading men like Lord Reay, Professor Goudy and Dr. Bisschop take some exceptions, particularly as to the legal position of Belgium under the Fifth Hague Convention relating to neutrals, and to the question of the free navigation of international rivers in time of war.

"German War Legislation in Belgium," by Dr. W. R. Bisschop, is an informing digest of that subject upon which he may comment later, now that he has brought the facts together. Among other papers in this volume are a "Report of the Committee on the Legal

Status of Submarines," a "Report of the Committee on Nationality and Registration," a "Note on the Construction of the Definition of 'British Subject' in Sect. 1 of the Nationality Act, 1914," by Sir Francis Piggott, "The Barbary States in the Law of Nations," by J. E. G. de Montmorency, "A Maxim and a Wrong Deduction" (relating to the doctrine of "free ships, free goods") by Sir Graham Bower, and "The Right of a Belligerent to Make War on a Neutral," by J. Delatre Falconbridge. This paper is a reply to Professor Visscher, with whom the writer disagreed in respect to the legal effect of the violation of the Fifth Hague Convention relating to the ordinary rights of neutrality as applied to Belgium. (See *Problems of the War*. Vol. II.)

JAMES L. TRYON.



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[*Abbreviations: BN.*, book note; *BR.*, book review; *Ed.*, editorial comment; *JD.*, judicial decision; *LA.*, leading article; *rev.*, reviewer; *Tr.*, translator.]

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